UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32773**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John I. SANGER	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 10 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 14th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **19 July 2024**.

Each request will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted], Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	10 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **19 July 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 May 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

13 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 May 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	12 July 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 August 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its seventh enlargement of time. Counsel has completed an initial review of the record of trial from the remanded hearing.
3) *United States v. Johnson*, ACM 40537 – The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. This case is on its fifth enlargement of time. Counsel has nearly completing drafting a final assignment of errors with civilian counsel.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin drafting and assignment of errors. Undersigned counsel has completed an initial review of the record of trial. However, counsel's other priorities have prevented him from beginning work on a brief to submit to this Court. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 July 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

15 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 July 2024.

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	12 August 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 September 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 144 days have elapsed. On the date requested, 180 days will have elapsed. Good cause exists to file this motion out of time because counsel filed a request for enlargement of time with this Court within time on 9 August 2024. However, that filing erroneously listed the wrong date requested for the enlargement to end on. Counsel respectfully withdraws the motion filed on 9 August 2024, and submits this one instead.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its tenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its eighth enlargement of time. Counsel has completed an initial review of the remanded record of trial.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution

exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin drafting and assignment of errors. Undersigned counsel has completed an initial review of the record of trial. However, counsel's other priorities have prevented him from beginning work on a brief to submit to this Court. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 August 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

13 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 August 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	10 September 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 October 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress, but does not have a substantive update at this time. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its eleventh enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Counsel has completed an in-depth review of the record of trial and has begun drafting an assignment of errors.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin drafting and assignment of errors. Undersigned counsel has completed

an initial review of the record of trial. However, counsel's other priorities have prevented him from beginning work on a brief to submit to this Court. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 September 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

12 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 September 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	10 October 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 November 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its twelfth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors with civilian counsel.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its tenth enlargement of time. Counsel has nearly completed an assignment of errors.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin drafting an assignment of errors. Undersigned counsel has completed an in-depth review of the record of trial. However, counsel's other priorities have prevented him

from beginning work on a brief to submit to this Court. Counsel anticipates beginning work on assignment of errors after completing the three cases currently occupying his top three priorities. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

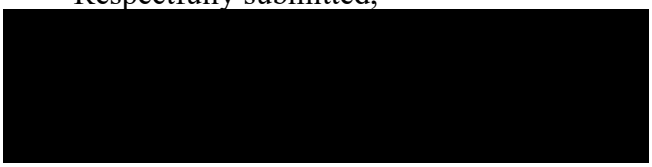
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 October 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

16 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 October 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	7 November 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 December 2024**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its thirteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case is on its ninth enlargement of time.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin work on an assignment of errors in this case. Counsel continues to work on *United States v. Hilton* with civilian counsel. Additionally, counsel is working towards completion of an assignment of errors in *United States v. Jenkins* with the intention of not asking for any further enlargements of time. Counsel has also been busy working supplements for petition of review before the Court of Appeals for the Armed Forces in *United States v. Bates* and *United States v. Vargo*.

Although counsel has reviewed this case and identified potential errors, he has been unable to dedicate the time necessary to begin working on an assignment of errors. Accordingly, an enlargement of time is necessary to allow undersigned time to begin work on an assignment of errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 November 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 November 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	6 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 January 2025**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its thirteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case is on its ninth enlargement of time.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete work on an assignment of errors. Counsel has been busy working towards completion of an assignment of errors for *United States v. Jenkins*. The brief for that case is due to this Court on 12 December 2024, and Counsel worked on it through the Thanksgiving weekend. Additionally, counsel has been working with civilian counsel in *United States v. Hilton*,

which required him to dedicate time to coordinate the transmission of sealed exhibits. Counsel has had to balance his work before this Court with other priorities before the Court of Appeals for the Armed Forces (CAAF). On 13 November 2024, counsel submitted a supplement for petition for review to the CAAF in *United States v. Bates*. This supplement addressed five issues. Additionally, counsel submitted a supplement for petition for review and a response to motion to dismiss to the CAAF in *United States v. Vargo* on 20 November 2024. Counsel worked through the weekend on 16 November 2024 in order to comply with the deadline set by the CAAF, while tending to a lingering illness that required him to go home from the office on multiple days. Additionally, counsel was on leave between 30 October 2024 and 5 November 2024. These circumstances and priorities have prevented counsel from being able to dedicate the time necessary for this case beyond a preliminary review. Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete drafting an assignment of errors and coordinate with Appellant to ensure that his interests on appeal are being met.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

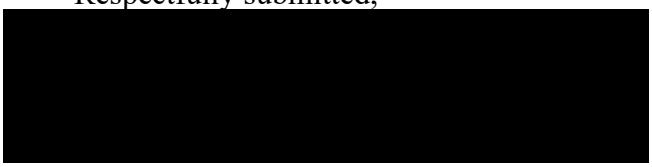
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 6 December 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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10 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 899 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 December 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	7 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 February 2025**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 330 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its seventh enlargement of time.
3) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing work on an assignment of errors in this case. Counsel was occupied with the completion of an assignment of errors for *United States v. Jenkins*, which counsel worked on through the Thanksgiving weekend and submitted to this Court on 12 December 2024. Additionally, counsel worked through his leave over the Christmas holiday to complete work on an assignment of errors for *United States v. Hilton*, which was submitted to this Court on 27 December 2024. Counsel is also occupied with the completion of a supplement for petition for review for the Court of Appeals for the Armed

Forces in *United States v. Scott* which counsel worked on through the New Year holiday in order submit on 7 January 2025. Counsel has completed an in-depth review of the record of trial, and has been working an assignment of errors that Counsel hopes to complete over requested period of time. Accordingly, an enlargement of time is necessary for counsel to complete work on an assignment of errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 January 2025.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
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(240) 612-4770

10 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 January 2025.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	7 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 14 days, which will end on **28 February 2025**. The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 344 days will have elapsed.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement

of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Sanger*, ACM S32773 – This is the instant case.
2) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.
3) *United States v. Torres Gonzalez*, ACM 24001 - The record of trial consists of six volumes and a 608-page transcript. There are 46 prosecutions exhibits, eight defense exhibits, and 25 appellate exhibits. This case is on its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing work on this case. Counsel has completed a draft assignment of errors which is ready to be routed through internal review before submission to this Court. However, on 31 January 2025, counsel was detailed to *United States v. Cook*, a case that the Court of Appeals for the Armed Forces granted review on. The brief in that case is due on 19 February 2025. Because of this, counsel has had to reorient his priorities to accommodate that deadline while also ensuring fidelity with the internal review process for the brief in this case. Counsel does not anticipate requesting any additional enlargements of time, given that the bulk of the work has now been completed. However, this request is necessary so that counsel can finalize an assignment of errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 February 2025.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

11 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN I. SANGER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32773 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 344 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 February 2025.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant*.	)	No. ACM S32773
	)	28 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ASSIGNMENTS OF ERROR:

I.

Whether Staff Sergeant Sanger's conviction should be set aside and dismissed with prejudice because the regulation that he was prosecuted for violating, Air Force Instruction 51-503 ¶ 3.4, was facially unconstitutional under the First Amendment.

II.

Whether SSgt Sanger's conviction should be set aside and dismissed with prejudice because Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 was unconstitutional as applied because the specification charged by the Government only alleged constitutionally protected speech.

III.

Whether the entry of judgment erroneously directed SSgt Sanger to be subject to criminal history indexing for a non-qualifying offense under Air Force Manual 72-102.

STATEMENT OF THE CASE

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington, of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (U.C.M.J.). (R. at 57.) The military judge sentenced SSgt Sanger to a bad-conduct discharge and reduction to the paygrade of E-1. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

STATEMENT OF FACTS

On 12 October 2018, the Secretary of the Air Force promulgated Air Force Instruction (AFI) 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*. (App. Ex. III at 1.) The publication listed the following guidance:

> Military personnel must not actively advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or those that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.

(*Id.* at ¶ 3.4.) This paragraph, as opposed to other provisions within the regulation, contained no indication that it was subject to criminal sanction under the U.C.M.J., nor did it indicate that "active advocacy" must have a military impact in order to be actionable in a criminal proceeding. Elsewhere, the regulation encouraged commanders to use "administrative powers, such as non-punitive counseling, and performance evaluations [to] deter such activities." (*Id.*) The Government charged SSgt Sanger under Article 92 for being derelict in the performance of his duties for failing to "refrain from *actively advocating* supremacist ideology and causes." (Charge sheet) (*emphasis added*.) As part of SSgt Sanger's guilty plea, the Government stipulated that AFI

51-508 was the source of the duty of which SSgt Sanger refrained from obeying. (Pros. Ex. 1 at 1.)

SSgt Sanger was inspired by various family members who had served in the military to postpone his college education and enlist in the Air Force. (R. at 101.) While stationed at Minot Air Force Base, SSgt Sanger's wife became pregnant with twins. (R. at 82-83.) Unfortunately, one of the twins did not survive beyond a few weeks after birth. (R. at 83.) This was an emotionally crippling and traumatic experience for SSgt Sanger. (R. at 84, 104.) SSgt Sanger struggled to cope and was left feeling "extremely numb and just not really aware of what was going on around [him] for about a year." (R. at 105.) Shortly after this, SSgt Sanger was deployed to Al Dhafra Air Base in the United Arab Emirates. (R. at 107.) Just before leaving, SSgt Sanger's wife had another birthing complication which resulted in a miscarriage. (R. at 108.)

During this time, SSgt Sanger was drawn to online communities discussing white extremist ideology. (R. at 21.) His interaction consisted of "posting messages, communicating with other people, reposting messages on social media, and advocating for those causes online." (R. at 21.) All of these posts were done anonymously without SSgt Sanger's identity or military affiliation being disclosed. (R. at 24.) SSgt Sanger never made a specific imminent threat to any particular person, nor did he devise any plans to implement ideological causes in the military. (R. at 21.) SSgt Sanger believed his involvement on these websites was the result of his deteriorating mental health which caused him to act impulsively. (R. at 110.) SSgt Sanger admitted that he "made a lot of posts not really thinking much of it, not really remembering what [he] posted," and would often take the posts down after realizing what he did. (*Id.*) SSgt Sanger frequently found himself in a pattern of posting white supremacists content and then going back to delete the posts after realizing that he did not hold those views. (R. at 30.)

SSgt Sanger later met in person with some of the individuals he met online. (R. at 27; Pros. Ex. 1 at 2.) This later became a significant source of shame for SSgt Sanger, and he renounced all white supremacist ideologies. (R. at 30, 111.) None of these interactions took place in a military setting, and none of the conversations involved directing white supremacist activities towards the military or members of the military. Nor did any of the interactions suggest imminent planned violence on behalf of supremacist or extremist causes or ideologies. Moreover, SSgt Sanger's commander never intervened or counseled him as described in the Air Force regulation. (R. at 97.)

I.

AFI 51-503 was facially unconstitutional under the First Amendment due to its failure to distinguish between lawful expressions of speech and unlawful conduct that could be prohibited in either a civilian or a military context.

Standard of Review

A guilty plea must be rejected where there is a substantial basis in law or fact for questioning it. *United States v. Simpson*, 81 M.J. 33, 36 (C.A.A.F. 2021). Whether a punitive enactment is unconstitutional is a question of law that is reviewed de novo. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005); *United States v. Sollmann*, 59 M.J. 831, 834 (A.F. Ct. Crim. App. 2004). "[A] plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the [Government] may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). A guilty plea conviction may be challenged where it is shown that the charge was impermissible "no matter how validly . . . factual guilt is established." *Id*. "The standard for sustaining a facial challenge to constitutional validity remains the same, whether the challenge addresses a statute or a regulation." *United States v. Castillo*, 74 M.J. 160, 162 n.1 (C.A.A.F. 2015) (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)). A facial constitutional challenge to a regulation

succeeds where the appellant can show that "no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Law & Analysis

A. AFI 51-508, ¶ 3.4, was facially unconstitutional because it criminalized speech that was protected under the First Amendment.

1. The speech did not fall into one of the traditional unprotected categories.

The regulation was unconstitutional because it curtailed protected speech under the First Amendment. The First Amendment of the Constitution enshrines the right to free expression by mandating that the Government "shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I. This applies even to the expression of ideas that the vast majority of society may find offensive or distasteful. *Virginia v. Black*, 538 U.S. 343, 358 (2003). No regulation may intrude upon this freedom by condemning speech "which our Constitution has immunized from governmental control." *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

Certain limited and specifically defined categories of speech may be exempt from this and subject to Government control. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (recognizing that the First Amendment has "permitted restrictions upon the content of speech in a few limited areas."). Categories of unprotected speech include "(1) incitement to imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats; and (9) speech presenting some grave and imminent threat the Government has the power to prevent." *United States v. Smith*, __ M.J. __, No. 23-0207, 2024 CAAF LEXIS 759, at *10 (C.A.A.F. Nov. 26, 2024) (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). "If a content-based restriction on speech does not fall within one of these historically recognized categories, the restriction is presumed to be unconstitutional." *Smith*, 2024 CAAF

LEXIS 759, at *10. Crucially, where a regulation prohibits advocacy of unlawful action, the prohibition may only extend "where such advocacy is directed to inciting or producing *imminent* lawless action and *is likely to incite or produce* such action." *Brandenburg*, 395 U.S. at 448 (emphasis added). A regulation "which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First [Amendment]." *Id.*

The charging scheme under AFI 51-508, ¶ 3.4, fails to pass constitutional scrutiny under *Brandenburg*. SSgt Sanger was charged with failing to refrain "from actively advocating supremacist and extremist ideology and causes." (Charge sheet.) Importantly, SSgt Sanger was not charged with negatively impacting the military mission, thus subjecting the charge to civilian standards for protected speech. *Smith*, 2024 CAAF LEXIS 759, at *8 (holding that civilian standards of First Amendment jurisprudence apply to charges unrelated to military status). As the purveyor of the charge sheet, the Government committed itself to a theory of criminal liability based solely on "active advocacy." *Smith*, 2024 CAAF LEXIS 759, at *8 (recognizing that the Government's theory of criminal liability is limited by its charging decision).

The relevant portion of the regulation, ¶ 3.4, stated:

> Military personnel must not actively advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or those that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.

(App. Ex. III at 2.)

This regulatory provision was an unconstitutional overreach because it specifically targets protected speech. By its plain reading, the regulation prohibits speech that advocates unlawful acts in the form of "illegal discrimination" or "the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights." (*Id.*) However, this limited

language is fatal to the regulation's validity because it fails to distinguish between mere advocacy and speech designed to incite or produce "imminent lawless action and . . . likely to incite or produce such action." *Brandenberg*, 395 U.S. at 447. Importantly, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *see United States v. Williams*, 553 U.S. 285, 300 (2008) (offering the statement, "I encourage you to obtain child pornography," as protected advocacy).

Brandenberg's relevance in military jurisprudence has been affirmed by the Court of Appeals for Armed Forces (C.A.A.F.), and is instructive in this case. *See Smith*, 2024 CAAF LEXIS 759, at *14. *Brandenberg* involved the state of Ohio's attempt to prosecute members of the Ku Klux Klan who had participated in a "rally" in which the defendant, along with others brandishing weapons, suggested "revengeance" against politicians who refused to comply with their interests. *Brandenburg*, 395 U.S. at 446. The defendant was prosecuted under an Ohio statute that prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45.

The Supreme Court held that this statute was unconstitutional because it purported "to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action." *Id.* at 448. Put differently, the statute did not distinguish mere advocacy from "incitement to imminent lawless action." *Id.* at 448-49. The regulation at issue fails for the same reason as the statute in *Brandenberg*; it broadly prohibits lawful advocacy without distinguishing incitement to imminent harm. Like that statute at issue in *Brandenberg*, the

regulation attempts to criminalize constitutionally protected speech on its face which invalidates the specification that SSgt Sanger was convicted of.

2. AFI 51-503, ¶ 3.4 was facially unconstitutional in a military context because it did not address speech which could be regulated by virtue of having a direct and palpable impact on the military.

Where speech does not fall into one of the traditional categories of being unprotected under the First Amendment, it might still be regulated in the military if the prohibited speech has a direct and palpable impact on the military mission. *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008); *United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024) (requiring "the Government to prove a direct and palpable connection to the military mission or environment" where speech is clearly protected or even if protected status cannot be determined). This type of impact might exist where the speech "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996).

Importantly, under *Brandenberg* the constitutional validity of the regulation depends on whether it specifies unprotected speech as opposed to that which cannot be regulated. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Statutes which have survived the *Brandenberg* test have done so because they detailed the harm that the proscribed action created. *E.g.*, *United States v. Miselis*, 972 F.3d 518, 542-43 (4th Cir. 2020) (holding Anti-Riot Act constitutional only insofar as it prohibits speech designed to incite a riot, but not those portions prohibiting speech intended "to organize, promote, encourage, participate in, or carry on a riot."). Similarly, a regulation that does not adequately draw a line between criminal and non-criminal behavior is unconstitutional. *Kolander v. Lawson*, 461 U.S. 352, 357 (1983). This is so regardless of the military context. *United States v. Moon*, 73 M.J. 382, 387 n.4 (C.A.A.F. 2014) (*quoting New York v. Ferber*, 458

U.S. 747, 764 (1982) ("[I]n order to be unprotected by the First Amendment, 'the conduct to be prohibited must be adequately defined' by the applicable law, and include a 'suitably limited and described' definition of [the prohibited conduct].")).

AFI 51-503, ¶ 3.4, makes no mention of deterring negative impacts on the military, nor does it limit its prohibition to speech creating a direct and palpably negative impact on good order and discipline. The regulation fails to distinguish between active advocacy which may be legal by virtue of having no military impact, versus conduct which can be prohibited because it does. The regulation is thus facially inadequate because it does not suitably define the prohibited conduct by distinguishing it from lawful behavior which would be protected under the First Amendment. This contrasts with the Supreme Court's holding in *Parker v. Levy*, 417 U.S. 733, 758 (1974). In that case, the appellant was convicted of making disloyal statements in violation of Article 134, UCMJ. *Id.* at 738-39. The Supreme Court upheld the constitutional validity of the charged offense against First Amendment concerns because the prohibition was sufficiently narrowed to speech which could be prohibited in a military context. *Id.* at 754. Specifically, Article 134 prohibited disloyal statements that had a "directly and palpably – as distinguished from indirectly and remotely – prejudicial [impact on] good order and discipline." *Id.* at 753 (quoting *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964)); *see also Wilcox*, 66 M.J. at 459 (military impact "may be so diffuse or tangential to the government's interests as to be outweighed by a servicemember's interest in speech."). The regulation that SSgt Sanger was charged with violating made no such distinction.

The insufficiency in AFI 51-508's prohibition against "active advocacy" cannot be cured with reference to other provisions in the regulation which do prohibit First Amendment activities based on impact to the military mission. For example, the regulation also prohibited "active

participation" in organizations that advocate supremacist or extremist ideology or causes. (App. Ex. III at ¶ 3.4.1.1.) Active participation includes activities that are "detrimental to good order, discipline, or mission accomplishment." (*Id.* at 3.4.2.1.7.) However, "active participation" is a separate offense and charging theory than the one that the Government chose to pursue against SSgt Sanger.

The question of whether other provisions of AFI 51-508 can provide the military nexus necessary for the prohibition against "active advocacy" to survive this constitutional challenge requires a determination of "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). This analysis involves seeking to harmonize independent provisions of the regulation, in part, by employing the surplusage canon which requires "that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). Importantly, due process prohibits the Government from charging one theory of liability and then arguing for a different offense and factual theory to sustain the conviction. *United States v. Mendoza*, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590, at *18 (C.A.A.F. Oct. 7, 2024).

That AFI 51-508 sets out two separate theories of liability for "active advocacy" vice "active participation" is apparent from its text.[1] As an initial matter, the regulation itself described the two concepts disjunctively. (*Id.* at ¶ 3.4.4) ("Commanders should intervene early . . . even though signs may not rise to active advocacy *or* active participation.") (emphasis added). This is probative of the drafter's intent to treat the two concepts as separate theories of liability. *Mendoza*, 2024 CAAF LEXIS 590, at *15 (reasoning that the "use of the disjunctive 'or' and applying the 'ordinary meaning' canon of statutory construction. . . reflect[s] separate theories of liability.") The disregard for this distinction would render each term subject to surplusage by removing any meaningful difference in the terms and making them superfluous. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Additionally, the conflation of "active advocacy" with "active participation" is also undermined by the different levels of severity attached to each prohibition. Regarding "active participation," AFI 51-508 assigned a punitive element by explaining that a violation is punishable under Article 92 of the U.C.M.J. This means that "active participation" is unequivocally subject to prosecution under Article 92(1) for violation of a general lawful order. *United States v. Nardell*, 21 C.M.A. 327, 329 (1972) ("The order in its entirety must demonstrate that rather than providing general guidelines for the conduct of military functions it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident.").

[1] That "active participation" is a separate theory of liability vice "active advocacy" is reinforced by the fact that the version of AFI 51-503 in effect prior to the version used to prosecute SSgt Sanger did not even include a prohibition on "active advocacy," only "active participation." AFI 51-903, *Dissident and Protest Activities* (Jul. 30, 2015). Therefore, "active advocacy" is a separate theory of liability, and the version in effect at the time of SSgt Sanger's court-martial has no language suggesting that the terms and definitions provided for "active participation" apply to "active advocacy."

Meanwhile, the Secretary of the Air Force did not include an application of sanction for "active advocacy," precluding its enforcement under Article 92(1), and instead relegating violations to the less severe offense of dereliction of duty. This shows two different theories of liability which would be rendered superfluous if read differently. Given the definitive separation, the required constitutional element of military impact possibly found in "active participation" cannot be extended to "active advocacy."

This Court should be unpersuaded that the elements of "active participation" can be imbued on "active advocacy." To do so would be an impermissible rewrite of the regulation for purposes of bringing it into First Amendment conformity. *Stevens*, 559 U.S. at 481 (explaining that a court cannot rewrite a statute to bring it in line with a constitutional requirement); *Miselis*, 972 F.3d at 537 (refusing to rewrite terms of statute prohibiting advocacy for rioting to mean incitement to cause a riot). Had the Government intended to rely on the definitions of "active participation" to pass constitutional muster, it would have been incumbent upon the Government to charge SSgt Sanger with violating that provision of the regulation. *Smith*, 2024 CAAF LEXIS 759, at *8. Instead, the Government prosecuted SSgt Sanger for "active advocacy," a concept under AFI 51-508 which was unenforceable in a court-martial because it did not distinguish between lawful speech and speech which could be prohibited by virtue of its negative impact on the military. Accordingly, this Court should find that SSgt Sanger's guilty plea was improvident because the regulation he was charged with violating was unconstitutional under the First Amendment.

3. AFI 51-508 fails under strict scrutiny.

Given that AFI 51-508 addressed protected speech, but was not narrowed towards prohibiting speech with a direct and palpable military nexus, it can only survive a constitutional challenge if it passes strict scrutiny. *Grijalva*, 84 M.J. at 438 (acknowledging that infringement

on protected speech is permissible against constitutional challenge if it passes strict scrutiny); *Wilcox*, 66 M.J. at 451 (reserving application of any First Amendment balancing test where prosecution of hate speech in military not shown to be "either prejudicial to good order and discipline or service discrediting."). Content-based restrictions on speech are presumptively unconstitutional and can survive strict scrutiny only if the Government can show "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

AFI 51-508, ¶ 3.4's content-based restriction on supremacist and extremist speech regardless of any impact on the military fails under strict scrutiny. The military status of SSgt Sanger alone is insufficient to create a compelling interest to justify curbing his protected speech. In *United States v. Wilcox*, the C.A.A.F. rejected the notion that a service member's hate speech could be prosecuted without a showing that it had a direct and palpable impact on the military. 66 M.J. at 451. That the C.A.A.F. declined to even apply a First Amendment balancing test is indicative that such conduct lacks a compelling interest. *See also United States v. Priest*, 21 C.M.A. 564, 572-73 (C.M.A. 1972) (questioning whether the military can have a justifiable interest in regulating "political discussion between members of the armed forces in the privacy of their rooms or at an enlisted men's or officers' club."). Even if a compelling interest were shown, the regulation is not narrowly tailored to carry that interest out because it captures a substantial range of constitutionally protected expressions. Accordingly, this Court should reject a holding that AFI 51-508, ¶ 3.5 survives strict scrutiny. Without this, SSgt Sanger's conviction was for an unconstitutional charge that this Court should withdraw and dismiss with prejudice.

B. AFI 51-503, was facially unconstitutional because it is void for vagueness.

AFI 51-503 is facially unconstitutional because it is void for vagueness. The void for vagueness doctrine is rooted in the Fifth Amendment of the Constitution which requires that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Due process requires a heightened degree of specificity when dealing with criminal offenses, as opposed to civil prohibitions, such that ordinary people can understand what conduct is proscribed so that the prohibition is not enforced in an arbitrary or discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Likewise, the Sixth Amendment entitles an accused "to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI. "[T]he Constitution demands more clarity of laws which threaten to inhibit constitutionally protected conduct, especially conduct protected by the First Amendment." *United States v. Gaudreau*, 860 F.2d 357, 359-60 (10th Cir. 1988). A regulation is void for vagueness if it does not provide sufficient notice for a servicemember to reasonably understand that his conduct is proscribed. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

AFI 51-503, ¶ 3.4, was void for vagueness because it did not clearly differentiate lawful speech which was protected by the First Amendment from unprotected speech which could be regulated. The regulation could only prohibit the charged offense in a military context if it was framed in terms of a direct and palpable impact on the military mission. In *Wilcox*, the C.A.A.F. concluded that a prosecution for disloyal statements involving supremacist and extremist ideas was capable of being charged under Article 134 because the terminal element framed the speech in terms of military impact. 66 M.J. at 448-49. The C.A.A.F. explained that "[i]f such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the

public, would find offensive." *Id.* at 449. Importantly, the C.A.A.F summarized this principle by holding that "to use this standard to impose criminal sanctions under Article 134, UCMJ, would surely be *both vague and overbroad*." *Id.* (emphasis added). Such is the case here, where the Government charged SSgt Sanger for "active advocacy" based on a definition outlined in AFI 51-503, while drawing absolutely no distinction between speech which is unlawful by virtue of a military context. By doing so, the Government charged SSgt Sanger in a manner that the C.A.A.F. outright foreshadowed would have been unconstitutionally vague.

The regulation fails under the void for vagueness doctrine both because it does not provide adequate notice of the prohibited conduct and because it does not provide adequate grounds for enforcement. *Moore*, 58 M.J. at 469. The regulation does not distinguish between lawful and unlawful forms of speech. This goes straight into the heart of the Supreme Court's concern in *Lawson*, in that it invites arbitrary enforcement. 461 U.S. at 358. To wit, it enabled the Government to criminally prosecute speech it deemed offensive based on the individual proclivities of the charging authority without regard to actual military impact.

This captures the Supreme Court's concern over the "potential for arbitrarily suppressing First Amendment liberties." *Id.* (quoting *Shuttlesworth v. Birmingham*, 382 U.S. 87, 91 (1965)); *cf. Levy*, 417 U.S. at 752-53 (validating the prohibition on disloyal statements under Article 134 only because the terminal element limits the regulation of speech to that having a direct and palpable impact on good order and discipline). The arbitrary nature of the regulation is reinforced by the lack of commander intervention which would, ostensibly, have allowed for great insight into particular military impacts while also allowing for a course-correction from SSgt Sanger without going through the criminal process of a court-martial.

This case is analogous to *City of Chi. v. Morales*, 527 U.S. 41 (1999). The great city of Chicago enacted an ordinance that prohibited suspected street gang members from loitering. *Id.* at 45. The ordinance required four predicates for enforceability.

> First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the persons must be "loitering," which the ordinance defines as "remaining in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

Id. at 47. The Supreme Court found the ordinance void for vagueness for failing to provide notice and because of its tendency to encourage arbitrary and discriminatory enforcement. On the first point, the Supreme Court determined that the ordinance did not advance a definition of loitering that narrowly encompassed conduct threatening harm as opposed to merely standing without a purpose, which would be harmless, innocent, and therefore constitutionally protected. *Id.* at 58-59. This showed the ordinance to be impermissibly vague "in the sense that no standard of conduct [was] specified at all." *Id.* at 60 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

Likewise, the Supreme Court also concluded that the ordinance failed to provide sufficient clarity to prevent arbitrary enforcement. This was because the definition of loitering, that is standing with no particular purpose, was so broad that it provided law enforcement absolute discretion to determine what activities qualified as such. *Id.* at 61. Importantly, the Supreme Court noted that the provisions could have withstood scrutiny "if the ordinance only applied to loitering that had an apparently harmful purpose or effect." *Id.* at 60; *see also id.* at 62 ("It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark.").

The regulation here fails for the same reasons as the ordinance in *Morales*. In terms of notice, the regulation provides no definition of "active advocacy" to distinguish between protected and unprotected expression. This is because although the regulation prohibits advocacy of "illegal discrimination" and advocacy of "the use of force, violence, or criminal activity," it is not narrowed to speech which is subject to regulation because it threatens imminent harm or an erosion of military objectives. *Supra* at 8. Like the broad definition of "loitering" in *Morales*, the definition of unlawful advocacy fails to provide an ordinary person with an understanding of precisely what conduct is prohibited.

Moreover, the regulation gave commanders and law enforcement insufficient criteria for non-arbitrary enforcement. While *Morales* acknowledged that specificity as to unlawful and unprotected speech may have rendered the ordinance permissive, AFI 51-50, ¶ 3.4, makes no such distinction, instead just prohibiting "active advocacy" regardless of whether it was protected by the First Amendment or not. This is because the regulation did not narrowly focus on unprotected conduct. The result of this lack of guidance is a regulation which enabled arbitrary enforcement. Accordingly, the regulation was void-for-vagueness, and SSgt Sanger's conviction for an unconstitutional charge cannot stand.

C. AFI 51-508, ¶ 3.4 was impermissibly overbroad because it made a substantial amount of constitutionally protected conduct unlawful.

Assuming *arguendo* that AFI 51-508, ¶ 3.4, did not violate the First Amendment outright or for vagueness, the regulation still fails for being overbroad. The doctrine of overbreadth renders a regulation unconstitutional where it makes "unlawful a substantial amount of constitutionally protected conduct" regardless of whether it may have some legitimate application. *Houston v. Hill*, 482 U.S. 451, 459 (1987). A regulation can survive an overbreadth challenge "only if . . . it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First

Amendment." *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). The issue hinges on "whether the enactment reaches a substantial amount of constitutionally protected conduct," as opposed to narrow impermissible application. *Hill*, 482 U.S. at 458 (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). However, criminal prohibitions are subject to particular care and scrutiny. *Id.* The chief concern captured by the doctrine of overbreadth is to combat regulations which may deter or have a chilling effect on constitutionally protected speech. *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987) (explaining that the chilling effect of constitutionally overbroad regulations would result in intolerable case-by-case adjudication). AFI 51-508, ¶ 3.4, is overbroad because it envelopes a substantial category of constitutionally protected speech. This violates the principle that an enactment "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Wilson*, 405 U.S. at 521-22.

The case at bar is analogous to *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). In that case the Supreme Court struck down a New Orleans ordinance that made it a crime for "any person wantonly to curse or revile or to use obscene or opprobrious language towards . . . any member of the city police." *Id.* at 131. The Supreme Court rejected the notion that the ordinance was permissible under the First Amendment because it captured speech qualifying as unprotected incitement. *Id.* at 133. This is because the ordinance was not narrowly and precisely drawn so as to limit that particular category of speech. *Id.* To the contrary, it facially punished an overbroad segment of spoken words outside of that which did qualify as incitement. *See also Hill* 482 U.S. at 463 (striking down ordinance prohibiting speech "in any manner" that "interrupt[s]" an officer as overbroad because plain text of ordinance not narrowly tailored to constitutionally unprotected

forms of speech). This overbroad application of AFI 51-508 creates an intolerable strain on the First Amendment rights of service members and therefore should be found unenforceable. This Court should therefore set aside SSgt Sanger's conviction with prejudice and vacate his sentence.

II.

Article 92, Uniform Code of Military Justice, 10 USC § 892, was unconstitutional as applied to SSgt Sanger.

Standard of Review

The issue of whether a statute is constitutional as applied is also reviewed de novo. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013). "[A] guilty plea does not preclude a constitutional challenge to an underlying conviction." *Sollmann*, 59 M.J. at 834 (citing *Mena*, 423 U.S. 61). A presumption against the waiver of a constitutional right exists unless it is clearly established that the accused intentionally relinquished a known right or privilege. *Smith*, 2024 CAAF Lexis 759, at *7 (quoting *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011)). "[W]hen an appellant alleges for the first time on appeal that his conviction was unconstitutional as applied to him, this Court generally declines to find waiver and instead applies plain error review." *Smith*, 2024 CAAF Lexis 759, at *7.

Because failure to challenge a constitutional error at the trial level is assumed to be unintentional, reviewing courts have held that the constitutional issue is forfeited, rather than waived, and a plain error analysis is applied. *Id*. "Plain error occurs 'where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.'" *Id.* (quoting *Sweeney*, 70 M.J. at 304). Error is "plain" when it is "'obvious' or 'clear under current law.'" *United States v. Warner*, 73 M.J. 1, 4 (C.A.A.F. 2013). "When a constitutional issue is reviewed for plain error, the prejudice analysis considers whether the error was harmless

beyond a reasonable doubt." *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018) (citing *United States v. Payne*, 73 M.J. 19, 25-26 (C.A.A.F. 2014)).

"Where, as here, an appellant argues that a statute is 'unconstitutional as applied,' [this Court] conduct[s] a fact-specific inquiry." *United States v. Ali*, 71 M.J. 256, 265-66 (C.A.A.F. 2012) (citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 289 (1921) ("A statute may be invalid as applied to one state of facts and yet valid as applied to another.")).

Law & Analysis

Article 92, UCMJ, was unconstitutional as applied to SSgt Sanger because the charging scheme the Government employed relieved it of its burden to prove that the offending speech was unprotected by the First Amendment. Due process prohibits the Government from employing charging methods that relieve it of proving vital elements of an offense. *United States v. Guardado*, 77 M.J. 90, 96 (C.A.A.F. 2017). This includes the use of a general provision like Article 92 to lower the Government's burden. *United States v. Curry*, 28 M.J. 419, 424 (C.M.A. 1989). When speech would be protected under the First Amendment in a civilian context, or even if "a court cannot determine whether the speech would be protected," the Government must prove "a direct and palpable connection to the military mission or environment." *Grijalva*, 84 M.J. at 438. This requirement exists to strike "the proper balance . . . between the essential needs of the armed services and the right to speak out as a free American." *Id.* at 436 (quoting *Wilcox*, 66 M.J. at 447).

The specification that SSgt Sanger was charged with under Article 92(3) was unenforceable because it did not go to unprotected speech or speech impacting the military. As a constitutional matter, SSgt Sanger could have been found guilty in fact of all the elements outlined in the specification and still not have committed a criminal offense. This is because the criminality of the speech depended on the Government proving the speech was not immune to regulation under

the First Amendment. Yet, the Government omitted this element altogether by charging SSgt Sanger with a specification that lowered the prosecution's constitutional burden.

Wilcox is instructive. There, the appellant was convicted under the general provision of Article 134, UCMJ, for "wrongfully advocat[ing] anti-government and disloyal sentiments, and encourag[ing] participation in extremist organizations while identifying himself as a 'US Army Paratrooper' on an America OnLine [AOL] Profile and advocat[ing] racial intolerance by counseling and advising individuals on racist views." 66 M.J. at 443. The specification also included the terminal element of Article 134 which held the Government to its burden to prove that the conduct "was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces." *Id.* This brought the specification into conformity with the Government's burden of proving that the speech impacted the military mission. *Id.* at 448. Similarly, in *Parker v. Levy*, the appellant was charged with disloyal statements under Article 134. 417 U.S. at 752-61. The Supreme Court held that this use of the general charging statute was permissible against constitutional challenge only because it included the terminal element which qualified the prohibition as narrowly encompassing speech that was prejudicial to good order and discipline. *Id.* at 754. However, the Government's use of Article 92 here included no similar provision, thereby impermissibly avoiding the requirement to establish that the speech had a military nexus.

The specification cannot be cured under the notion that a military nexus was implied under Article 92. In *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009), the C.A.A.F. rejected the proposition that all enumerated offenses under the U.C.M.J. were inherently prejudicial to good order and discipline or service discrediting. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), provides guidance. The C.A.A.F. found that a specification under Article 134 which failed

to include the terminal element was deficient and that an impact on good order and discipline could not be read as inherently tied to the offending conduct. *Id.* However, the C.A.A.F. found no error because the accused was instructed on the terminal element as required under Article 134 and admitted his conduct was service discrediting during the guilty plea inquiry. In this case, the Government's use of Article 92 avoided the requirement to show that SSgt Sanger's offending speech had an impact on the military mission. As in *Ballan*, this is an error which cannot be cured by categorizing the offending conduct as inherently prejudicial to good order and discipline. Rather, the Government's failure to allege a military nexus is fatal. Unlike *Ballan*, the providence inquiry did not contain discussion or admission of a specific military impact. Nor could such a discussion have corrected the faulty charging scheme. This is because military impact was never alleged, and unlike the Article 134 offense in *Ballan*, it was not an element required by the charge itself. This demonstrates that the error was fatal and warrants that this Court set aside the finding of guilty and vacate the sentence.

V.

The entry of judgment erroneously directed subjecting SSgt Sanger to criminal history indexing for a non-qualifying offense under Air Force Manual 72-102.

The 1st Indorsement to the entry of judgment (E.O.J.) erroneously subjects SSgt Sanger to criminal indexing for a non-qualifying offense. The execution of criminal indexing represents an error in the processing of the court-martial after the E.O.J. which this Court can and should correct under Article 66(d)(2). 10 U.S.C. § 866(d)(2) ("[This] Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record.").

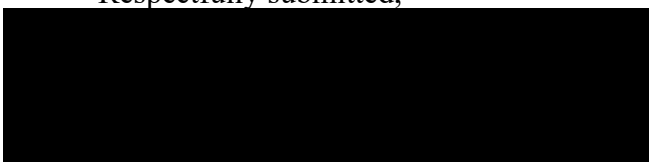
An error in processing includes an incorrect notation on the 1st Indorsement of the E.O.J. *Cf. United States v. Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *14 (C.A.A.F. 2024) (finding no processing error in the judgment of the court where incorrect notation on statement of trial results was corrected in the E.O.J.). Here, the 1st Indorsement to the E.O.J. subjects SSgt Sanger to criminal indexing. SSgt Sanger's sole conviction in this case was for willful dereliction of duty in violation of Article 92, UCMJ. "Nonserious" offenses are excluded from the reporting requirement for criminal history indexing. Department of Defense Instruction 5505.11, *Fingerprint Reporting Requirements*, ¶ 1.2(d) (Oct. 31, 2019) (implementing 28 C.F.R. § 20.32's exclusion on the reporting of nonserious offenses). Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, Attachment 5 (Jul. 21, 2020), lists specific offenses which are excluded. Among these is willful dereliction of duty under Article 92. The regulation makes an exception for this type of offense if the underlying conduct "can be analogized to an offense under the [U.C.M.J.] not in this list, or to a violation of the [United States Code] that otherwise requires submission of fingerprints and criminal history record data." *Id.* The specification that SSgt Sanger was convicted of cannot be analogized to any such offense. This is even more so considering that all other speech related-offenses under the U.C.M.J. are either unprotected by civilian standards (*e.g.* Communicating Threats) or are sufficiently tailored to require a direct and palpable impact on the military mission (*e.g.*, Article 134, UCMJ, 10 U.S.C. § 934; Article 117, UCMJ, 10 U.S.C. § 917). Accordingly, the offense that SSgt Sanger was convicted of was excluded from the reporting requirement for criminal history indexing.

This error occurred after the judgment was entered into the record. Air Force regulations require the "[Staff Judge Advocate] signs and attaches to the [E.O.J.] a first indorsement, indicating whether . . . criminal history record indexing is required under DoDI 5505.11." Department of Air

Force Instruction 51-201, *Administration of Military Justice*, ¶ 20.41 (Apr. 14, 2022). Criminal history record indexing explicitly happens *after* the E.O.J. is signed by the military judge pursuant to Article 60c, UCMJ. *Id.* Even if the indorsement is part of the E.O.J. by operation of R.C.M. 1111(b)(3)(F), the error—criminal history indexing for a non-qualifying offense—still occurs after the E.O.J. This is because the records indexing takes place after the E.O.J. when the first indorsement is entered on the record. *See* DAFI 51-201, at ¶¶ 29.35, 29.35.3 (Apr. 14, 2022) (explaining how the indexing requirement is executed after the E.O.J.). Given the posture of this error, it is reviewable by this Court under Article 66(d)(2). Additionally, it makes sense that the E.O.J. indorsement is the document the Court should review for post-trial processing error because it is the most recent notification to law enforcement entities about SSgt Sanger's ability to possess firearms. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ and attachments).

To provide appropriate relief, this Court should modify the criminal indexing notation through its power under R.C.M. 1111(c). R.C.M. 1111(c) permits this Court to correct the E.O.J. "in performance of [its] duties." Article 66(d)(2), UCMJ, is one such "duty" defined by statute and the indorsement is part of the E.O.J. R.C.M. 1111(b)(3)(F); DAFI 51-201, at ¶ 20.41. Consequently, this Court can provide appropriate relief for this error via R.C.M. 1111(c). Alternatively, R.C.M. 1112(d)(2) allows this Court to send a defective record back to the military judge for correction. Because the indorsement is a required component of the E.O.J., albeit not part of the "findings" and "sentence," it can be corrected. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN I. SANGER** United States Air Force *Appellant.*	)	No. ACM S32773 31 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION SHOULD BE SET ASIDE AND DISMISSED WITH PREJUDICE BECAUSE THE REGULATION THAT HE WAS PROSECUTED FOR VIOLATING, AIR FORCE INSTRUCTION 51-508, PARAGRAPH 3.4, WAS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

II.

WHETHER APPELLANT'S CONVICTION SHOULD BE SET ASIDE AND DISMISSED WITH PREJUDICE BECAUSE ARTICLE 92, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 892 WAS UNCONSTITUTIONAL AS APPLIED BECAUSE THE SPECIFICATION CHARGED BY THE GOVERNMENT ONLY ALLEGED CONSTITUTIONALLY PROTECTED SPEECH.

III.

WHETHER THE ENTRY OF JUDGMENT ERRONEOUSLY DIRECTED APPELLANT TO BE SUBJECT TO CRIMINAL HISTORY INDEXING FOR A NON-QUALIFYING OFFENSE UNDER AIR FORCE MANUAL 72-102.

STATEMENT OF CASE

Pursuant to his pleas, a military judge found Appellant guilty of one charge and one in violation of Article 92, UCMJ. (*Entry of Judgment*, 6 November 2023, ROT, Vol. 1.) Appellant was charged with the following specification:

> In that Staff Sergeant John I. Sanger, United States Air Force, 92d Logistics Readiness Squadron, who knew of his duties at or near Spokane, Washington, on divers occasions between on or about 07 February 2020 and 26 April 2022, was derelict in the performance of those duties in that he willfully failed to refrain from actively advocating supremacist and extremist ideology and causes, as it was his duty to do.

(Id.) The military judge sentenced Appellant to reduction to the grade of E-1 and a bad conduct discharge. (Id.)

Appellant entered into a plea agreement with the convening authority. (App. Ex. II.) Relevant to this appeal, Appellant waived "all motions which may be waived under the Rules for Courts-Martial" pursuant to the plea agreement. (App. Ex. II at 2.)

STATEMENT OF FACTS

Appellant Engaged in Prohibited Supremacist and Extremist Activities

The Air Force prohibited service members from advocating supremacist and extremist ideology or causes. Air Force Instruction 51-508 (AFI 51-508), *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*, paragraph 3.4.1.1 (12 October 2018). Relevant portions of AFI 51-508 are as follows:

> **AFI51-508 12 OCTOBER 2018** **15**
>
> 3.4.1. Military personnel must reject active participation in criminal gangs and in other organizations that (**Note:** Military members who violate this paragraph, to include any of its subparagraphs, are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the UCMJ):

3.4.1.1. Advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes;

3.4.1.2. Attempt to create illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin;

3.4.1.3. Advocate the use of force, violence, or criminal activity; or

3.4.1.4. Otherwise engage in efforts to deprive individuals of their civil rights.

3.4.2. Active participation in such gangs or organizations is prohibited. **(T-0). Note:** Military members who violate this paragraph, to include any of its subparagraphs, are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the UCMJ.

3.4.2.1. Active participation includes, but is not limited to:

3.4.2.1.1. Fundraising for, or donating money to, the organization;

3.4.2.1.2. Demonstrating or rallying;

3.4.2.1.3. Recruiting, training, organizing, or leading members;

3.4.2.1.4. Distributing material (including posting on-line);

3.4.2.1.5. Knowingly wearing gang colors or clothing;

3.4.2.1.6. Having tattoos or body markings associated with such gangs or organizations; or

3.4.2.1.7. Otherwise engaging in activities in furtherance of the objective of such gangs organizations that are detrimental to good order, discipline, or mission accomplishment or are incompatible with military service.

Below are examples of Appellant's engagement in activities in violation of AFI 51-508.

Between on or about 7 February 2020 and 26 April 2022 Appellant was part of a national white extremist group called "Pacific Northwest Imperative." (Pros. Ex 1 at 1-2.) Within this national white extremist group, Appellant was also a part of its subgroups: a regional subgroup called "Pacific Northwest Tribal Chat;" a local subgroup called "Sushi Boys;" and a sub-local group called "The Sanctuary." (Id.) Many times, Appellant participated in group text chat sessions and met with persons, online and in person, associated with these groups using social media accounts such as Telegram – an encrypted message application on social media. (R. at 28; Pros. Ex. 1 at 1-5.) Appellant met with these groups, discussed their shared ideology and plans, and advocated for their ideology and causes. (Pros. Ex. 1 at 2.)

Appellant repeatedly expressed his distaste for Jewish and African-American individuals. (Pros Ex. 1 at 2-5.) Appellant also stated that he was against the COVID-19 vaccination and encouraged non-white people to receive the vaccination because it would cause them to be sterile. (Pros. Ex 1 at 2.) Appellant on numerous occasions reposted posts on social media with symbols associated with Nazism. (Id.)

Moreover, Appellant's posts on social media, primarily on Telegram, contained rhetoric pertaining to the United States military. (Pros. Ex 1 at 3.) While deployed at Al Dhafra Air Base, United Emirates, Appellant shared a post on Telegram that mentioned:

> All you people thinking the military will do a blackout and arrest pedophile elites and traitorous politicians are beyond delusional. Every head of a military branch is on board with labeling white men domestic terrorists for daring to have their voice heard. The system WILL not attack itself. Your vote will NEVER matter again. And most of all, they are coming to terrorize you and your family soon.

(Pros. Ex. 1 at 3.) Appellant reposted a post on his Telegram account containing images of military personnel responding to the United States Capitol riot on 6 January 2021 with the following caption, "A 78yr old man campaigned from his basement. Picks the most unpopular VP. Received the most votes in history. . . Has 25,000 troops to make sure it goes the way he wants. And nobody is allowed to question it. . . ." (Id.)

After deployment, near Spokane, Washington, Appellant messaged a Telegram user, stating, "We aren't even allowed to criticize public officials anymore. . . It is my sincerest hope that one day we will hunt them down." (Pro Ex. 1 at 3.) Appellant messaged another Telegram user and mentioned someone who allegedly planned to detonate a bomb in Washington D.C. and stated, "Hopefully he inspires others." (Id.)

Then Appellant posted a statement on Telegram that cited Mein Kampf written by Adolf Hitler, and advocated that a small percentage of the American population could engage in a revolutionary war against the government of the United States of America. (Pros. Ex. 1 at 3.)

On 23 October 2021, Appellant introduced an undercover agent (UCA) working for the Air Force Office of Special Investigations in person to several of his friends who were part of the group called "The Sushi Boys." (R. at 39; Pros. Ex. 1 at 4.) Appellant facilitated a group chat with the leaders of the Pacific Northwest Tribal Chat and vouched for the UCA before the UCA was also accepted into this group. (Pros. Ex. 1 at 4.)

On 27 October 2021 near Spokane, Washington, Appellant made threats against those who enforced government COVID-19 mask mandates:

> They think they have zero consequences. What if there were real consequences for imposing these tyrannical measures on people and destroying their lives as an agenda? We as a people, need to figure out any and all means that we can inflict real material losses on these entities. We need to figure out who they are, figure out who [sic] they are made of, and target individuals, offices, facilities, vehicles, infrastructure. Al1 of it.

(Id. at 4.) In that same conversation, Appellant mentioned that he wanted to do more than talk online. (Id.) Appellant wanted to "fucking kill people." (Id.) Appellant described African-Americans as "an infestation." (Id.) Appellant then stated:

> The idea is to establish a new nation for whites because its already such a densely populated white region. From there you can start other smaller tribes that grew across the country that are supported by the motherland. But that would be well after the new nation was established and the new nation was here to stay.

(Id.)

On 5 November 2021, near Spokane, Washington, Appellant witnessed members of the "The Sushi Boys" damage public property with white supremacist graffiti and stickers. (Id.) A few days later, Appellant continued to make the following racist comments:

> I don't hate every single Jew without reservation. I just hate what they've done to Western civilization, and I hate their nature, and I hate them as a whole.
>
> The blacks know they can say and do whatever they want and there's no consequence. They take advantage of all of it. They've figured out that in the military; they are actually in charge. As far as the military goes, they are basically worthless.
>
> People need to think like insurgents. Where can I attack? Who can I attack with? What are potential targets? Everyone needs to realize they are... that to the government, they are the enemy. And if you are a friend of freedom, that means to stop playing by the rules. Now that doesn't mean to slaughter people…They are going to call you a terrorist. As a matter of fact, we're terrorists without even doing anything. Just for believing that we should survive as a race. We're terrorists . . . so that bridge has already been crossed.

(Id.)

A couple of months later, Appellant made various comments that discussed obtaining body armor plates from an Air Force lieutenant from Security Forces. (Pros. Ex. 1 at 5.) Appellant, near Spokane, Washington, said that "if you have the OPSEC, you have the awareness, and if you have, like, the recon, on a specific target, you can make something happen." (Id.) Appellant also mentioned that the 92nd Security Forces Squadron did not have clear accountability over its gear other than firearms, hinting that Appellant could obtain gear from the military to support his white supremacist advocacy. (Id.)

Appellant reiterated his disdain towards the COVID-19 vaccine, and he wanted to design a patch for those who would never submit to COVID-19 vaccination. (Id.) Appellant said, "I will spill my blood, and I will spill blood, to keep my blood in non-compliance." (Id.)

During an interview with law enforcement agents, Appellant said that he had placed a sticker in downtown Spokane stating, "It's ok to be white," when explaining that he was concerned that the white race was dying out. (Id.)

Appellant admitted during his guilty plea inquiry that he had an anonymous account online that would repost posts from other extremists advocating for white supremacist causes and violence. (R. at 27.) Appellant would meet with individuals from these extremist groups and "put stickers in the form of activism" at or near Spokane, Washington. (R. at 27.) Appellant explained that he would meet with people from these group to discuss how to further that agenda, and he tried to find other people to bring into the group chats. (R. at 27.)

Appellant Waived a First Amendment Defense

Appellant waived "all motions which may be waived under the Rules for Courts-Martial." (App. Ex. II at 2.) During the plea colloquy, the military judge discussed the First Amendment with Appellant. (R. at 34.) Appellant understood that he had certain rights under the First Amendment, such as freedom of speech and freedom of assembly. (R. at 35.) Appellant had the chance to discuss any potential defense under the First Amendment with his defense counsel. (Id.) After consulting his defense counsel, Appellant told the military judge that although he understands that the First Amendment protects speech, he understood that there are strict rules for service members. (Id.) Appellant agreed that the First Amendment did not provide him a defense. (Id.)

Notably, trial defense counsel affirmed "that pursuant to the terms of the plea agreement, the defense is not making a motion to dismiss based on failure to state and offense." (R. at 47.) Trial defense counsel then clarified that Appellant a motion to dismiss for failure to state an offense would also include any constitutional concerns. (Id. at 48.) The military judge explained

to Appellant that by pleading guilty and agreeing to waive all waivable motions, he gave up the right to make waivable motions, including motions on First Amendment grounds. (Id. at 49.) Appellant agreed that per the plea agreement he gave up the right to make any motions which by law is given up by virtue of pleading guilty. (Id.)

ARGUMENT

I.

AFI 51-508 WAS FACIALLY CONSTITUTIONAL.

Waiver

Appellant affirmatively waived the First Amendment issues raised in Issues I and II. In deciding whether there was an affirmative waiver, this Court looks to the record to see if a party's statements demonstrate a purposeful decision. United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). Affirmative waiver means the issue is permanently waived and will be not reviewed for plain error. United States v. Hardy, 77 M.J. 438, 441 (C.A.A.F. 2018) (citing United States v. Swift, 76 M.J. 210 (C.A.A.F. 2017)). While this Court maintains the authority to pierce waiver, it should not do so in this case. United States v. Cassaberry-Folks, No. ACM 40444, 2024 CCA LEXIS 500, at *5 n. 7 (AF. Ct. Crim. App. 22 November 2024) (unpub. op.). This Court only ignores waiver in the most deserving cases. Id. (citing United States v. Blanks, No. ACM. 38891, 2017 CCA LEXIS 186, at *22 n.11 (A.F. Ct. Crim. App. 17 March 2017) (unpub. op.)) In Blanks, this Court declined to pierce waiver when an appellant affirmatively waived an issue on the record. The same was done in this case, and this Court should not pierce waiver. Appellant knowingly and purposefully waived the ability to make such a motion to get the benefit of a plea agreement, and the military judge fully explored the issue with Appellant to ensure his understanding.

Appellant cites Menna v. New York, U.S. 61, 63 n. 2 (1975) for the proposition that a guilty plea does not waive a constitutional claim. 423 U.S. 61, 63 n. Menna states that a guilty plea *alone* does not waive a facial constitutional challenge. Id. Here, the Appellant went further than just merely pleading guilty. Appellant in the stipulation of fact agreed that AFI 51-508 was a lawful regulation, and he had a duty to obey such regulation. (Pros. Ex. 1 at 1.) Appellant, per the plea agreement, waived all waivable motions. (App. Ex. II at 2.) Next, trial defense counsel told the military judge that he waived constitutional claims associated with failure to state an offense. (R. at 48.) And lastly, Appellant told the military judge that the First Amendment did not provide him a defense. (R. at 34.) An appellant may waive a constitutional right by clearly establishing that "there was an 'intentional relinquishment or abandonment of a known right or privilege." United States v. Harcrow, 66 M.J. 154, 157 (C.A.A.F. 2008) (internal citations omitted). This Court should enforce this intentional abandonment of a known right.

This Court should find that Appellant waived the right to raise Issues I and II implicating the First Amendment.

Standard of Review

In the event this Court does not find waiver, it should apply the plain error standard. Appellant has the burden of demonstrating: 1) that there was error; 2) that the error was clear or obvious; and 3) that the error resulted in material prejudice to his substantial rights. United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014). When a constitutional issue is viewed for plain error, the analysis considers whether the error was harmless beyond a reasonable doubt. United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018). "A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish no set of

circumstances under which the [regulation] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).

This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321.

Law and Analysis

Appellant failed to meet the "heavy burden" required to assert a facial challenge to a statute or regulation. United States v. Ali, 71 M.J. 256, 266 (C.A.A.F. 2012) (citing Salerno, 481 U.S. at 745). Appellant makes countless arguments explaining why AFI 51-508 paragraph 3.4 was facially unconstitutional – mainly because it prohibited constitutionally protected speech, and the regulation failed to proscribe what activities or speech would be prohibited in the military context. (App. Br. at 5, 8.) Now on appeal, Appellant disregards that he agreed in the stipulation of fact that 51-508 was a lawful regulation, and that he had a duty to obey such regulation. (Pros. Ex. 1 at 1.)

Neither our superior Court, this Court, or other Courts of Criminal Appeals (CCAs) have found that a regulation prohibiting or limiting political activities for services members is unconstitutional on its face under the First Amendment. In fact, regulations are presumed to be lawful. United States v. Caporale, 73 M.J. 501, 503 (AF. Ct. Crim. App. 2013) *see also* United States v. Wilson, 33 M.J. 797, 800 (A.C.M.R. 1991) (finding that Article 92, UCMJ, is a

legitimate regulatory measure under the First Amendment context). Appellant failed to prove that any application of 51-508 was unconstitutional. Salerno, 481 U.S. at 745. Undermining Appellant's arguments throughout his brief is his lack of acknowledgement that the military can regulate a service member's rights under the First Amendment.

A. The military can regulate a service member's right to free speech and free assembly and therefore AFI 51-508 paragraph 3.4 was valid.

The First Amendment protects freedom of speech. U.S. CONST. amend. I. But the "right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. N.H., 315 U.S. 568, 571 (1942). There are well-defined and narrowly limited categories of speech not protected under the constitution. These include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. United States v. Alvarez, 567 U.S. 709 (2012).

Our superior Court recently acknowledged "that the government may place additional burdens on a servicemember's First Amendment free speech rights due to the unique character of the military community and mission." United States v. Smith, No. 23-0207, slip op. at 7 (C.A.A.F. 26 November 2024.) The Supreme Court has noted that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections." Parker v. Levy, 417 U.S. 733, 758 (1974). The military can "regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated." United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008).

With this said, service members enjoy some measure of the right to free speech. Id. But in the military context, speech that "interferes with or prevents the orderly accomplishment of

the mission or prevents a clear danger to loyalty, discipline, mission or morale of the troops" is not protected under the First Amendment. United States v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996).

The government has an interest in maintaining discipline, morale, and esprit de corps. Id. The military is not a "deliberative body. It is the executive arm. Its law is that of obedience." Id. "The military may restrict the soldier's right to free speech in peacetime because speech may 'undermine the effectiveness of response to command.'" Id. (citing Levy 417 U.S. at 759). Our superior Court noted the great importance of regulating service members freedom of speech to ensure that the military can accomplish the mission:

> Because of the hostile environment faced by servicemembers, there must be an instinctive obedience to orders from superiors. This instinct must be internalized to accomplish the military mission of protecting the nation to deter war, and if necessary, to successfully fight wars.
>
> The interest in maintaining good order and discipline has few counterparts in the civilian community. Thus, Courts will 'not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct.' Avrech v. Secretary of the Navy, 520 F.2d 100, 103 (D.C. Cir. 1975).

Id. at 396.

The "armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control in combat." Id. (citing Nunn, The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases, 29 Wake Forest L. Rev. 557, 558 (1994). Therefore, military members "are subject to disciplinary rules and military orders, twenty-four hours a day, regardless of whether they are actually performing a military duty." Id. at 396-97.

"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." Greer v. Spock, 424 U.S. 828, 840 (1976). Simply put, the law allows military service branches to regulate speech and political activities because the government has an interest in maintaining discipline, morale, esprit de corps, and loyalty to service. Brown, 45 M.J. at 396.

In line with case law, the Department of Defense Instruction 1325.06 (DoDI 1325.06), *Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces*, (27 November 2009, incorporating changes 10 December 2021) prohibits supremacist and extremist advocacy. Extremist activities are inconsistent with the responsibilities and obligations of military service and the oaths of office and enlistment. DoDI 1325.06, Enclosure 3, para. 8.a.[1] The military can prohibit extremist activities even when such activities would be constitutionally protected in a civilian setting. Id. Active participation in extremist activities may be punished in the military context for compelling reasons. Id. Engaging in extremist activities "undermines morale and reduces combat readiness." Id. Extremism "calls into question the [service members] ability to follow orders from, or effectively lead and with, persons of diverse backgrounds, preventing maximum utilization and development of the Department's most valuable asset: its people." Id. Extremist behavior "damages the Nation's trust and confidence in the Department as an institution and the military as a professional fighting force." Id.

[1] Department of Air Force Instruction 51-508, *Political Activities, Free Speech and Freedom of Assembly* (24 March 2023) incorporates DoDI 1325.06, Enclosure 3, paragraph 8. This regulation superseded AFI 51-508 dated 12 October 2018, the regulation in effect throughout Appellant's charged misconduct.

Similar to DoDI 1325.06, AFI 51-508 prohibited certain activities because advancing efforts to promote supremacist and extremist ideologies deprive other individuals of their civil rights and are incompatible with military service. AFI 51-508 para. 3.4. The military had a legitimate interest in doing so. If military members advocate and advance efforts to deprive other individuals of their civil rights through supremacy and extremist ideologies, then how can they be asked to protect individual rights afforded by the Constitution on the battlefield? *See* Brown, 45 M.J. at 397 ("The heart of a free society depends upon national security and the ability to project power worldwide. Service members are sworn to protect our national security."). A service member spouting supremacist and extremist ideology in his or her spare time makes it harder to work as a cohesive military unit with people of diverse racial and religious backgrounds. The military has a legitimate interest in proscribing such conduct, because it will undermine the effectiveness of servicemembers' response to command. So contrary to Appellant's assertions, AFI 51-508 survives constitutional scrutiny. (App. Br. at 12.)

The restrictions under AFI 51-508 were no greater than essential to further the government's interest in promoting the disciplined performance of military duties because the regulation did not prohibit mere membership, but prohibited active participation and advocacy that would impact military cohesiveness. AFI 51-508, para. 3.4.2.2. In line with well-established case law allowing the military to regulate service member's First Amendment rights, the primary goal of AFI 51-508 was to balance service members freedom of expression to the maximum extent as possible consistent with good order and discipline and national security. AFI 51-508 para. 3.1.1. In sum, the military can regulate servicemember's free speech, and the Air Force's efforts to do so through AFI 51-508 were legitimate.

B. The Wilcox standard did not apply in Appellant's case.

Appellant also argues that AFI 51-508 is unconstitutional in the military context because it did not address speech which can be "regulated by virtue of having a direct and palpable impact on the military." (App. Br. at 8.) But a closer look at the regulation shows that the purpose of 51-508 was to prohibit activities and speech that would negatively impact the military mission.

Appellant's argument hinges on the standard set forth in Wilcox in the Article 134, UCMJ, context. In Wilcox, a case about freedom of speech, the Court noted that to meet the terminal element under both the service discrediting clause and prejudicial to good order and discipline clause the government would have to "prove a direct and palpable connection to the military mission or environment." 66 M.J. at 446. Recently, United States v. Grijalva, CAAF also noted this heightened standard but once again in the Article 134, UCMJ, context. 84 M.J. 433, 438 (C.A.A.F. 2024) ("This Court held that if the government attempts to use the second clause of Article 134, UCMJ, to punish 'speech that would be impervious to criminal sanction in the civilian world,' the government must prove 'a direct and palpable connection between [the] speech and the military mission or military environment.'") (internal citations omitted).

Appellant's case is different. AFI 51-508, paragraph 3.4 was punishable under Article 92, UCMJ. (App. Ex. III.) Article 92, UCMJ, is a military specific offense. The military must have a valid military purpose to impose a duty. United States v. Pugh, 77 M.J. 1, 3 (C.A.A.F. 2017). The order "must relate to a military duty, including all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline and usefulness of members of a command and directly connected with the maintenance of good order in the service." Id. (internal citations omitted). Here, the Air Force specifically sought to regulate the

extremist conduct described in 51-508 and therefore created a specific military duty to not engage in extremist activities to maintain good order and discipline. And the Air Force specifically designated that violations of the regulation would be punishable under Article 92, UCMJ. This demonstrates how there is a military nexus inherently built into Article 92, UCMJ. That article give the military the authority to prosecute servicemember who fail to adhere to military specific duties.

Given that the military nexus is inherently built into Article 92, UCMJ, there was no requirement for the government to prove an additional element otherwise seen in the Article 134, UCMJ, free speech context. By charging Appellant under Article 92, UCMJ, the military already signified that he was being prosecuted for an offense that harmed military readiness. Extremist activities are inconsistent with the responsibilities and obligations and oaths of office and enlistment. Extremist activities can call into question the service members loyalty and discipline and ability to take orders and work with people of diverse backgrounds. This type of behavior can damage the Nation's trust and confidence in the military as a fighting force. So Appellant is wrong in asserting that he was not "charged with negatively impacting the military mission" and therefore civilian standards for protected speech applied. (App. Br. at 6.)

Appellant is also wrong to claim that the regulation failed to "distinguish between active advocacy which may be legal by virtue of having no military impact, versus conduct which can be prohibited because it does." (App. Br. at 9.) At no point in his assignments of error did Appellant acknowledge that the military could regulate a service members speech. Given that the higher courts have allowed the military to regulate free speech to ensure loyalty and discipline, AFI 51-508 was lawful in regulating "advocacy" and articulated an appropriate military nexus. Appellant is seeking this Court to analyze his conviction as courts have done so

in the Article 134, UCMJ, context. But this Court should not accept Appellant's invitation to require the government to prove an additional element of a direct and palpable military nexus to Article 92, UCMJ, offenses.

For sake of argument, even if the Wilcox standard applied, AFI 51-508 paragraph 3.4 prohibits speech and assembly that could have a direct and palpable military nexus. Active participation and advocacy in extremist and supremacist activities undermine morale and reduce combat readiness. A service member's advocacy and participation raises doubts the individual's ability to follow orders, effectively lead, and serve with persons of a different race, color, national origin, religion, or sex. Engagement with supremacist and extremist groups presents a clear danger regarding the service member's loyalty and discipline required to serve in the armed forces, and damages the public's trust and confidence in the military as a fighting force. *See* Greer; 424 U.S. at 840; Brown, 45 M.J. at 396. For these reasons, Appellant reliance on Wilcox is unpersuasive and he fails to show that AFI 51-508 was facially unconstitutional.

C. AFI 51-508 was not void for vagueness or over broad.

Lastly, Appellant argues that AFI 51-503 was void for vagueness and overly broad. Appellant's arguments are without merit because AFI 51-508 clearly proscribed conduct associated with supremacist and extremist groups.

An appellant lacks standing to challenge the facial validity of a statute or regulation that clearly applies to his conduct irrespective of whether a statute or regulation could be read to be vague in some other hypothetical case. United States v. Forbes, 77 M.J. 765, 774 (N.M. Ct. Crim. App. 2018) (internal citations omitted). Here, AFI 51-508 was a regulation that put service members on notice of prohibited political activities and speech, and even cited DoDI 1325.06 that provided further guidance in prohibited extremist activities. The regulation outlined

what a supremacist and extremist view was. AFI 51-508 3.4.2.3-3.4.2.4. For example, a supremacist ideology is having a view that you are superior to other members of one race, color, gender, national, origin, or ethnic group. AFI 51-508 para. 3.4.2.3. Appellant's speech showed his distaste towards others of a different race and religion, and highlighted his views on white supremacy, as well as his efforts to advance these ideas. The regulation at issue clearly applied to Appellant's conduct. Thus, Appellant lacks standing to assert this claim. AFI 51-508 was not so vague that service members could not understand what conduct was proscribed. United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003).

Appellant also argues that the regulation was void for vagueness because it failed to define advocacy. (App. Br. at 17.) But the regulation did not have to define this term to put service members on notice of what constituted prohibited conduct. The plain meaning of "advocate" – the term used throughout AFI 51-508, paragraph 3.4 – is defined as "one who defends or maintains a cause or proposal," "one who supports or promotes the interest of a cause or group," and "one who pleads for the cause of another." Advocate, MERRIAM WEBSTER DICTIONARY (Online Ed. 2025). The term advocate was unambiguous, and the plain meeting of the word provided sufficient notice of prohibited activities.

Appellant argues again that AFI 51-503 did not differentiate between lawful speech and unprotected speech, and that the regulation could only prohibit the charged offense in the military context if it had a direct and palpable impact on the military mission. (App. Br. at 14.) This is not the standard in which military courts view statutes or regulations to evaluate vagueness. *See* United States v. Rundle, ARMY MISC 20190158, 2019 CCA LEXIS 236, at *5 (A. Ct. Crim. App. 17 May 2019) (unpub. op.) ("Neither the service courts nor our superior

court, to date, has used Wilcox to evaluate a vagueness or overbreadth challenge."). Appellant's argument that AFI-508 is void for vagueness is unpersuasive.

Further, AFI 51-508 was not overly broad. In the First Amendment context, a statute is "overbroad" when a substantial number of its applications are unconstitutional when compared with the statute's "plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 490-91 (2010). AFI 51-508 did not have a substantial number of applications that are unconstitutional. For example, the regulation states that mere membership in certain political groups was not prohibited. AFI 51-508, para. 3.4.2.2. Moreover, possessing literature or visiting websites associated with supremist or extremist organization on a non-government computer was not prohibited absent active advocacy or participation. AFI 51-508 para. 3.4.4.3. The regulation was not overly broad because the military can regulate speech that may otherwise be protected in the civilian sector. Even so, the regulation did not suffer from substantial overbreadth given that it still allowed activities that stopped short of advocacy or participation.

Appellant fails to meet his burden of showing how this regulation on its face was unconstitutional. Appellant waived any First Amendment constitutional issues on appeal, and even if he did not, given that AFI 51-508 was facially constitutional, the military judge did not commit plain error in accepting Appellant's plea of guilty. This Court should deny this assignment of error.

II.

ARTICLE 92, UCMJ, WAS CONSTITUTIONAL AS APPLIED TO APPELLANT.

Standard of Review

The United States incorporates the plain error standard of review outlined in Issue I. Further, to determine whether a statute is unconstitutional as applied, this Court conducts a "fact specific inquiry." United States v. Goings, 72 M.J. 202, 205 (CA.AF. 2013). Upon plain error review, to prove that a facially constitutional criminal statute is unconstitutional as applied, the appellant must point to particular facts in the record that prove why his interests should overcome Congress' and the President's determinations that his conduct be proscribed. Id. (citing United States v. Vazquez, 72 M.J. 13, 16-21 (C.A.A.F. 2013); Ali, 71 M.J. at 266). This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. Forbes, 78 M.J. at 281.

Law and Analysis

A. Appellant waived this issue.

As discussed in Issue I, Appellant affirmatively waived all waivable motions, and specifically waived all constitutional issues implicating this First Amendment. Thus, this Court should find that Appellant waived raising this assignment of error and decline to review it further.

B. As applied to Appellant Article 92, UCMJ, was constitutional.

If this Court finds that Appellant did not waive the issue, Appellant failed to meet his burden under the plain error standard. Prosecuting Appellant under Article 92, UCMJ, for failing to obey AFI 51-508 was not clear and obvious error. AFI 51-508 was constitutional as applied to Appellant. Appellant recognized himself that AFI 51-508 was a lawful regulation, and

that he had a duty to obey such regulation. (Pros. Ex. 1 at 1.) There was no question that Appellant violated AFI 51-508 paragraph 3.4.

1. Appellant's speech and association with extremist groups violated AFI 51-508.

Appellant advocated supremacist and extremist ideas, and his speech was unprotected under the military application of the First Amendment. Appellant repeatedly expressed his hatred towards Jewish and African-American individuals. (Pros. Ex. 1 at 2-5.) Appellant mentioned that he wanted to "fucking kill people" and described black Americans as "an infestation." (Pros. Ex. 1 at 4.) Appellant wanted to establish a new nation for whites. (Id.) A few days later, "The Sushi Boys" vandalized property. Appellant's rhetoric encouraged others to commit crimes and vandalize property to further their white supremacy cause. And on 12 November 2021, Appellant mentioned that "as far as the military goes, [blacks] are basically worthless." (Pros. Ex. 1 at 4.) Appellant's advocacy for white supremacist expressive views was not protected speech under military standards because it called into question his ability to follow orders from authorities and effectively lead and serve with persons of diverse backgrounds – especially those of a different race or religion – that could have a direct impact on Appellant's ability to serve in the military that consists of a diverse force. If Appellant had a Jewish or African-American commander or supervisor, could he be relied up on to follow their orders? If he had a Jewish or African-American subordinate, could he be relied upon to treat them fairly and without discrimination?

Not only did Appellant post online rhetoric associated with Nazism and white supremacy, but also his speech also implicated the United States military and therefore violated AFI 51-508. The following statements were inconsistent with military cohesiveness and good order in discipline in that Appellant deliberately lacked discipline and loyalty required to follow the

mission and take orders from authorities. Appellant shared a post on his Telegram account that "every head of the military branch is on board with labeling white men domestic terrorists for daring to have their voice heard." (Pros. Ex. 1 at 3.) On Telegram, Appellant posted a statement that cited Mein Kampf, a book authored by Adolf Hitler, to advocate that the American population should engage in a revolutionary war against the government of the United States. (Id.) Appellant through his advocacy spread ideologies contrary to the mission of the United States armed forces. A member of the armed forces, a representative of the federal government, who took an oath to defend the constitution, should not advocate to overthrow the government as it conflicts with the very core of the military mission. For these reasons, his statements were not protected speech under military free speech standards.

There was no denying that Appellant's association with these extremist groups was more than just mere membership. His speech was unprotected in that he advocated and actively participated in organizations whose main goal was to infringe on individual rights of certain groups based on race and religion – a direct violation of AFI 51-508. As mentioned above, AFI 51-508 was facially constitutional, and the military could proscribe the conduct in which Appellant took part in. Thus, Appellant failed to meet his burden that Article 92, UCMJ, criminalizing Appellant's failure to obey AFI 51-508 was unconstitutional as applied to him.

2. Appellant is wrong in that Wilcox required the government to prove an additional element of a direct and palpable military nexus.

Appellant's main point in this assignment of error is that the government "relieved it of its burden to prove that the offending speech was unprotected under the First Amendment." (App. Br. at 20.) Essentially Appellant asserts that the government omitted the element of proving that Appellant's speech was unprotected or speech impacting the military. Appellant relies on Wilcox and Levy, but those cases were decided under the Article 134, UCMJ, context

that required a terminal element. As previously explained in Issue I, the military nexus is inherent in Article 92, UCMJ. The Air Force created a military duty for Appellant to obey, and he failed to uphold that duty. And to that point, Appellant himself agreed that he had a duty to obey AFI 51-508.

Appellant was charged with violating a regulation and prosecuted under Article 92, UCMJ. No court has found that Article 92, UCMJ, unconstitutional because it does not require a terminal element required in Article 134, UCMJ. In United States v. Van Velson, this Court noted that the "direct and palpable connection between [Appellant's] speech and the military mission or military environment" is only an issue when the government criminalizes speech under Article 134, UCMJ. 2024 CCA LEXIS 283 (AF. Ct. Crim. App. 12 July 2024) (unpub. op.). Appellant misses the mark in his first two assignments of error. The government did not prosecute his misconduct under Article 134, UCMJ. Appellant cited no authority that under the Article 92, UCMJ, context the government must prove an additional element, such as a direct and palpable military nexus. Wilcox did not hold that every case criminalizing speech the government must prove a direct and palpable military nexus. By virtue of being charged with dereliction of a military duty that was created by an Air Force regulation, there was already a direct and palpable military nexus.

It was not error, certainly not clear and obvious error, to prosecute Appellant for his white supremacist statements and advocacy under Article 92, UCMJ, instead of Article 134, UCMJ. The military can take regulatory measures to regulate the conduct of service members and punish violations under Article 92, UCMJ.

In sum, Appellant waived all waivable motions and even agreed that he had no First Amendment defense and therefore waived all constitutional claims. Article 92, UCMJ,

criminalizing Appellant's failure to obey AFI 51-508 was constitutional as applied to Appellant, and the military judge did not abuse his discretion in accepting Appellant's plea of guilty. For these reasons, this Court should deny this assignment of error.

III.

APPELLANT'S POST-TRIAL PROCESSING WAS NOT IMPROPERLY COMPLETED WHEN THE STAFF JUDGE ADVOCATE CORRECTLY FOUND THAT CRIMINAL INDEXING UNDER DODI 5505.11 APPLIED TO APPELLANT'S CONVICTION.

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statement: "Fingerprint Card and Final Disposition in accordance with DoDI 5505.11: Yes." (Statement of Trial Results, 18 October 2023, ROT, Vol. 1; Entry of Judgment 6 March 2024, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

A. This Court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with DoDI 5505.11.

This Court recently held in its published opinion in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 28 May 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at 681. Similarly, criminal indexing, such as fingerprint card in accordance with DoDI 5505.11, *Fingerprint Reporting Requirements* (31

October 2019) is also a collateral matter rather than elements of the findings or sentence. In other words, reviewing Appellant's criminal indexing notations in the STR and EOJ is beyond this Court's authority to review.

B. The DoDI 5505.11 annotation was entered into the record before the judgment of the court was entered via the EOJ. Thus, this Court lacks jurisdiction to review Appellant's claim under Article 66(d)(2).

Contrary to Appellant's assertion, Article 66(d)(2), UCMJ, does not grant this Court authority to provide relief under this assignment of error. Article 66(d)(2), UCMJ, does not apply to Appellant's case because the DoDI 5505.11 annotation on the first indorsement of the STR and incorporated into the EOJ was neither an error nor did it occur after the judgment was entered on the record. "Article 66(d)(2), UCMJ, only authorizes a CCA to provide relief when there has been an 'error or excessive delay in the processing of the court-martial." United States v. Williams, 85 M.J. 121, 126 (C.A.A.F. 2024). In Williams, our Superior court pointed to three statutory conditions that must be met before a CCA may review a post-trial processing error under Article 66(d)(2), UCMJ. Id. First, an error must have occurred. Id. Second, an appellant must raise a post-trial processing error with the CCA. Id. Third, the error must have occurred after the judgment was entered. Id. at 27.

Before distributing the first indorsement to the STR, the Staff Judge Advocate must sign and annotate whether criminal record history indexing is required in accordance with DoDI 5505.11. Department of Air Force Instruction 51-201, *Administration of Military Justice*, para. 20.6 (14 April 2022.) As a result, the DoDI 5505.11 annotation on the first indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. Article 60(1)(C), UCMJ. Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in

Article 66(d)(2). *Compare* Article 66, UCMJ, *with* Article 60c, UCMJ. Because the STR and the first indorsement are entered into the record before the judgment is entered into the record under Article 60c, UCMJ, the DoDI 5505.11 annotation on the first endorsement is not an error occurring "*after* the judgment was entered into the record." Article 66, UCMJ, (emphasis added). They are entered into the record again and simultaneously with the EOJ. Because they are entered again simultaneously with the judgment of the court via the EOJ they are not errors occurring after the judgment is entered into the record. Article 60c, UCMJ. Thus, Article 66(d)(2), UCMJ, does not grant this Court jurisdiction to review DoDI 5505.11 annotation on either the STR or the EOJ.

Appellant argues that the CCA can modify the criminal indexing notation and provide relief under R.C.M. 1111(c). (App. Br. at 24.) But R.C.M.s 1101(e) and 1111(c)(3) only allow a CCA to modify and STR or EOJ "in the performance of their duties and responsibilities." Since per Article 66(d)(1) and (2), the CCA's "duties" include only acting with respect to the finding and sentence in the EOJ and correcting processing errors *after* the EOJ, the CCA has no additional authority to correct the STR or EOJ independent of Article 66(d), UCMJ.

Department of the Air Force Manual 71-102, *Air Force Criminal Indexing*, paragraph 9.1-9.5 (10 September 2024) offers an expungement process. Since Appellant believes that he has been improperly coded, he should use that administrative process rather than asking this Court to exceed its jurisdiction.

C. Appellant's criminal indexing notation on the First Indorsement to the STR and EOJ were correct under DoDI 5505.11.

Although Attachment 5 in Department of the Air Force Manual 71-102, *Air Force Criminal Indexing*, Attachment 5 (21 July 2020), excludes Article 92 offenses from fingerprinting requirements, Appellant's conviction falls under an exception. If the underling

misconduct can be analogized to an offense under the UCMJ not already contained in the exclusion list in Attachment 5 or is a violation under the United States Code that requires submission of fingerprints and criminal history data, the offense must be indexed. Id.

Indexing was proper because Appellant's conduct was analogous to the crime of committing disloyal statements towards the United States, an enumerated offense under Article 134, UCMJ. The elements for disloyal statements are: 1) the accused made a certain statement; 2) that statement was communicated to another person; 3) the statement was disloyal to the United States; 4) the statement was made with the intent to promote disloyalty or disaffection toward the United States or to impair with the loyalty to the United States or good order and discipline and discipline of any member of the armed forces; and 4) the conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces or both. Manual for Courts-Martial, United States part IV para. 97b.(1)-(5) (2019 ed.) (MCM). Appellant made a statement to others when he posted a statement on Telegram that referenced Mein Kampf authored by Adolf Hitler and advocated for Americans to engage in a revolutionary war against the government of the United States. (Pros. Ex. 1 at 3.) This statement was disloyal to the United States, and was made to encourage further disloyalty or disaffection to the United States. Appellant made other statements that promoted disloyalty or disaffection towards the United States, such as "[not being] allowed to criticize public officials anymore…it is my sincerest hope that one day we will hunt them down." (Id.) Appellant also reposted a social media post that mocked the then Commander in Chief, the United States President. (Pros. Ex. 1 at 3.) Throughout Appellant's time engaging in prohibited political activities and extremism he continued to show distaste and disloyalty to the United States and advocated to further these objectives. For these reasons, Appellant's statements were analogous to offenses that required

criminal indexing – disloyal statements. Even if this Court has authority to consider Appellant's claim if improper indexing, this Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the finding and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF ON BEHALF OF**
Appellee,	)	**APPELLANT**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	No. ACM S32773
JOHN I. SANGER	)	
United States Air Force	)	7 April 2025
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Appellant, Staff Sergeant (SSgt) John I. Sanger, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer (Ans.), dated 31 March 2025. In addition to the arguments in his opening brief (Opening Br.), filed on 28 February 2025, SSgt Sanger submits the following arguments for the issues below.

I.

SSgt Sanger's prosecution and conviction for protected speech was unconstitutional.

A. SSgt Sanger's constitutional challenge to the charge was not waived by his guilty plea.

SSgt Sanger's constitutional challenge to the offense of "active advocacy" was not waived by his guilty plea because a guilty plea "does not waive a claim that–judged on its face–the charge is one which the [Government] may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 (1975). Such challenges go to the "very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974). This contrasts with "antecedent constitutional violations" because *prima facie* violations undermine a court's basis "to enter the conviction or impose the sentence." *Blackledge*, 417 U.S. at 30; *cf. United States v. Bronce*, 488 U.S. 563, 569 (1989) ("There are exceptions [to waiver

pursuant to a guilty plea] where on the face of the record the court had no power to enter the conviction or impose the sentence"). This view has been adopted by the Court of Appeals for the Armed Forces. *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014). SSgt Sanger's challenge was not waived because his conviction cannot be legally sustained regardless of whether he was factually guilty. *Menna*, 423 U.S. at 62, n.2.

The Government asserts that SSgt Sanger waived his right to constitutionally challenge the underlying charge by virtue of his guilty plea. (Ans. at 7.) It claims that this waiver was affected by the unconditional nature of the plea agreement which included a provision "waiving all waivable motions." (*Id.*) But this view was soundly rejected by the United States Supreme Court in *Class v. United States*, 583 U.S. 174 (2018). In that case, the petitioner pleaded guilty to unlawful possession of a firearm, but challenged the constitutionality of the offense under the Second Amendment on appeal. *Id.* at 176. The Supreme Court held that the challenge was not waived because it went to the Government's power to constitutionally prosecute the petitioner. *Id.* at 182. This is distinct from the types of issues which can be waived on a plea of guilty because they contradict "the terms of the indictment or the written plea agreement." *Id.* at 181. Put differently, the challenge to the underlying charge "could not be characterized as part of the trial" or any "case related government conduct" that may have taken place before the plea was entered. *Id.* at 182 (internal citations omitted). Hence, the petitioner's admission to the offending conduct could be maintained while still challenging the whether the prosecution itself was valid. *Id.* at 183. Such is the case here where SSgt Sanger can maintain his admission to the conduct discussed in the stipulation of fact and the plea inquiry while still contesting whether the Government could have actually prosecuted him for that conduct.

The Supreme Court also discussed the distinction between unconditional and conditional

guilty pleas, dispensing with the notion that a conditional guilty plea was necessary to preserve a constitutional challenge. *Id.* at 183. The Supreme Court held that unconditional guilty pleas, including those that waived all "nonjurisdictional defects" did not waive a *Menna-Blackledge* challenge because the Federal Rules of Criminal Procedure did not require a conditional guilty plea to preserve it. To reach this conclusion the Supreme Court pointed to the language of Rule 11(a)(2) of the Federal Rules of Criminal Procedure which stated:

> *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

The Rules for Courts-Martial contain nearly identical language:

> *Conditional Pleas*. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty.

R.C.M. 910(a)(2). It stands to reason that if the Supreme Court held that the Federal Rules of Criminal Procedure did not require a conditional guilty plea to preserve the issue, that the Rules for Courts-Martial warrant the same treatment.

The Government also contends that SSgt Sanger's admission regarding the legality of Air Force Instruction (AFI) 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel* (October 12, 2018), amounted to waiver. This is untrue. If SSgt Sanger did make such an admission, it would not be any different than the petitioner in *Class* acquiescing to the firearm statute he pleaded guilty to violating. Just as the Supreme Court found that there was no waiver in that case, so too should this Court hold that there is no waiver here. Additionally, SSgt Sanger's admission has no impact on the actual legality of the regulation. This is because the validity of a regulation is a legal determination to be made by judicial authority, not the

accused. *United States v. New*, 55 M.J. 95, 102 (C.A.A.F. 2001). Moreover, lawfulness of the regulation was not an element of Article 92. *Id.* at 100. This means that SSgt Sanger's constitutional challenge does not contradict the guilty plea such that the issue would be waived as a matter "antecedent" the court-martial. *Blackledge*, 417 U.S. at 29-30 (distinguishing antecedent claims which are waived on appeal because they contradict the factual basis of the plea). SSgt Sanger could have remained silent on the issue of the regulation's legality and still have pleaded guilty.

Moreover, whether a regulation is lawful is distinct from whether it provides "general guidelines" for conduct as opposed to prohibitions that can result in criminal sanction. *See United States v. Nardell*, 21 C.M.A. 327, 329 (C.M.A. 1972) ("The order in its entirety must demonstrate that rather than providing general guidelines . . . it is basically intended to regulate conduct."). For this reason, SSgt Sanger could affirm the lawfulness of the regulation without conceding that it had a valid punitive function. Accordingly, SSgt Sanger did not waive his right to directly challenge the constitutionality of his conviction.

B. SSgt Sanger was prosecuted with a discrete offense under AFI 51-508, ¶ 3.4, and the Government cannot validate his conviction with reference to other theories of liability.

The Government chose to prosecute SSgt Sanger for the discrete offense of "active advocacy" under AFI 51-508, ¶ 3.4, and cannot rescue the conviction by appealing to other potential offenses. This is because shifting to another theory of liability would amount to exceptions and substitutions which are impermissible on appellate review. *United States v. English*, 79 M.J. 116, 119 (C.A.A.F. 2019). The Government opens its statement of facts by asserting that the relevant portions of AFI 51-508 are ¶s 3.4.1 through 3.4.2.1.7. (Ans. at 2-3.) However, those portions deal with the separate offense of "active participation in criminal gangs and in other organizations." The Government charged SSgt Sanger with "active participation"

which is mentioned in ¶ 3.4. This limits the discussion of whether the Government's prosecution against him was constitutionally permissible to just that provision.

C. The correct standard for assessing First Amendment issues in the military demonstrates that AFI 51-508, ¶ 3.4, was unconstitutional

Where speech does not fall into one of the traditional unprotected categories of speech under the First Amendment, speech in the military may still be regulated so long as the prohibition is tailored to that having a "direct and palpable" impact on the military mission or environment. *United States v. Wilcox*, 66 M.J. 442, 448-49 (C.A.A.F. 2008.) Importantly, "If such a connection were not required, the entire universe of servicemembers opinions, ideas, and speech would be held to the subjective standard" and such prohibitions would "surely be both vague and overbroad." *Id.* at 449. Although *Wilcox* was a case involving Article 134, U.C.M.J., the C.A.A.F. acknowledged this standard as being applicable for all military prosecutions "not only when it is clear that the First Amendment would protect speech in a civilian context, but also . . . where a court cannot determine whether the speech would be protected." *United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024).

SSgt Sanger spent the majority of his opening brief explaining why AFI 51-508, ¶ 3.4, does not survive this type of constitutional scrutiny, even under the heightened First Amendment restrictions that can be imposed on military members. (Opening Br. at 8.) Despite this, the Government contends that "At no point . . . did [SSgt Sanger] acknowledge that the military could regulate a service member's speech." (Ans. at 16.) But, that is exactly what the arguments under *Wilcox* are: the heightened ability for the military to regulate speech. The issue raised is not whether the military could regulate SSgt Sanger's speech, it is whether the regulation they used to prosecute him can survive constitutional scrutiny because of its tendency to prohibit constitutionally protected speech. AFI 51-508, ¶ 3.4, fails constitutional scrutiny because it was

not narrowed to speech having a direct and palpable impact on the military, thus rendering it "vague and overbroad" in the manner warned of in *Wilcox*. 66 M.J. at 448-49.

The Government overlooks the standard set fourth in *Grijalva*, and instead references the obsolete dangerous speech test found in *United States v. Brown*, 45 M.J. 389, 396 (C.A.A.F. 1996). (Ans. at 12, 13, 17.) However, in *United States v. Smith*, ___ M.J. ___, 2024 C.A.A.F. LEXIS 759, at *14 (C.A.A.F. 2024), the C.A.A.F. recognized the dangerous speech test as having "effectively been abrogated by the more speaker-friendly" test in *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969). This latter test only applies to incitement cases and requires the offending speech to have a likelihood of causing imminent lawless action. *Id.* Relying on this test, the Government goes to great lengths to describe hypothetical ways "active advocacy" could have impacted the military.

But this fails to account for the fatal deficiency in AFI 51-508, ¶ 3.4, which is that the regulation envelopes all advocacy without any distinction between protected lawful speech and that which could have a direct and palpable impact on the military mission or environment. Crucially, even if there is a direct and palpable connection, the interest of the military in prohibiting the speech must be balanced against the right to speak out as a free American. *Wilcox*, 66 M.J. at 447. The Government claims, without support, that the regulation's primary goal "was to balance the service members freedom of expression to the maximum extent possible consistent with good order and discipline and national security." But the specific prohibition in ¶ 3.4 contains no distinction between these competing interests, instead swallowing whole all First Amendment activities involving "active advocacy." The Government gives no further consideration to this, instead focusing on a litany of hypothetical harms that are not shown to have occurred.

The Government contends that the military nexus required to regulate speech in the military is inherent in Article 92, U.C.M.J., because it is a military specific offense. The Government explains that because "AFI 51-508, ¶ 3.4 was punishable under Article 92, UCMJ," and Article 92 is a military specific offense, the prosecution of the regulation survives constitutional scrutiny because the military could only impose a duty if it had a valid military purpose. (Ans. at 15.) This reasoning is cyclical and assumes that an imposed duty has a valid military purpose simply because it was imposed. The military could impose a duty without a valid military purpose, which the Government ignores. In fact, this was the very subject of *United States v. Serianne*, 69 M.J. 8, 11 (C.A.A.F. 2010), where the C.A.A.F. found that a Navy regulation requiring self-reporting of crimes was an invalid duty because it conflicted with a superior regulation that eliminated the requirement. Moreover, the notion that an imposed duty is valid just because it can be specified as a charge under Article 92 is absurd by virtue of the fact that virtually all military functions can be prosecuted – whether successfully or not – as dereliction of duty. In fact, the Secretary of the Air Force did not mandate a punitive function behind ¶ 3.4. This contradicts the Government's argument that "the Air Force specifically designated violations of the regulation [as] punishable under Article 92." Rather, the regulation's introduction lists specific paragraphs that are subject to prosecution under Article 92, and ¶ 3.4 is not among them. (App. Ex. III at 1.) Elsewhere, the regulation discusses the charged activities as subject to command intervention, "primarily through counseling." (*Id.* at 4.)

Perhaps more damaging to the Government's position is the fact that the C.A.A.F. has explicitly ruled against the notion that enumerated offenses under the U.C.M.J. are inherently prejudicial to good order and discipline by having a direct and palpable military impact. *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009). Per *Grijalva*, there must be a direct and

palpable connection to the military mission or environment for a speech regulation to survive constitutional scrutiny. 84 M.J. 433, 438. This aside, dereliction of duty does not require a military nexus as an element, and, if such an element were required, the Government did not include it in the specification. None of the Government's attempts to read such a nexus into the regulation or the statute overcome AFI 51-508 ¶ 3.4's chief deficiency, which is the failure to plainly define the prohibited conduct in terms that narrowly comport with the requirements of the First Amendment. The Government offers that the plain meaning of "advocacy" is sufficient to describe constitutionally prohibited conduct based on a dictionary definition. (Ans. at 18.) But constitutional scrutiny requires that the definition provided in the statute be tailored specifically to unprotected speech. *Brandenberg*, 395 U.S. at 447. Advocacy, of course, is protected speech in most contexts. For this reason, this Court should be unpersuaded by the Government's position.

II.

Article 92, U.C.M.J., was unconstitutional as applied to SSgt Sanger because he was charged exclusively with engaging in First Amendment protected activities.

The Government's use of Article 92 to prosecute SSgt Sanger was defective because the specification did not articulate speech that had a military nexus such that it could be prohibited. Put differently, the specification overtly charged constitutionally protected speech without distinction. (Charge sheet.) The Government seems to double down on this by suggesting that "His speech was unprotected in that he advocated and actively participated in organizations whose main goal was to infringe on individual rights of certain groups." (Ans. at 22.) As an initial matter, the Government's references to active participation are unpersuasive because that is a separate theory of liability with which SSgt Sanger was not charged. As for active advocacy, the Government overlooks that advocacy, no matter how repugnant, is a protected category of speech.

Virginia v. Black, 538 U.S. 343, 358 (2003). Advocacy among service members may be prohibited if it has a direct and palpable connection to the military, but the regulation did not require this distinction, and the specification under Article 92 did not establish it either. This matters because in *Wilcox* the C.A.A.F. determined that the appellant's off-duty racist speech was protected by the First Amendment and could not be prosecuted where it had no "reasonably direct and palpable effect on the military mission or environment." 66 M.J. at 451. The C.A.A.F. held this in spite of the appellant identifying as a military member. *Id.* In this case, the Government obviated their burden of having to prove that SSgt Sanger's protected speech could be subject to military regulation. This rendered the Government application of Article 92 unconstitutional as applied.

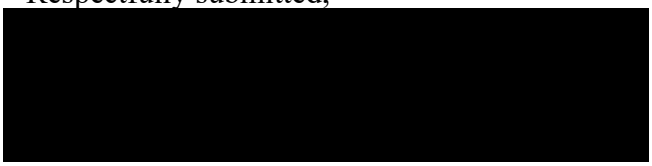
III.

The offense that SSgt Sanger was convicted of was not subject to criminal indexing because, as the Government concedes, it did not require a direct and palpable military impact which would have been required to show that it was closely correlated to any offense under Article 134.

SSgt Sanger's conviction under Article 92 was not subject to criminal history indexing because it was exempted by Air Force Manual (AFMAN) 72-201, *Air Force Criminal Indexing* (July 21, 2020), and the underlying misconduct cannot be analogized to an offense which is subject to criminal indexing. AFMAN 72-201, ¶ 2.1.1. After the Government spent its answer explaining why the offense that SSgt Sanger was convicted of did not require a direct and palpable impact on the military, the Government paradoxically asserts that the offense was subject to criminal indexing because it was closely related to disloyal statements under Article 134. But Article 134 offenses under clauses 1 and 2 require the terminal element. Additionally, the prohibition on disloyal statements is narrowly tailored to speech which demonstrate unfaithfulness toward the United States as a political entity, as distinct from departments or

agencies within the Government. M.C.M., pt. IV, ¶ 97.c. By contrast, SSgt Sanger was convicted of advocating supremacist and extremist causes, and the underlying conduct contained no expression disloyal to the United States itself. For these reasons, the Government contention is unfounded, and the entry of judgment should be corrected to remove the instruction for criminal indexing.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 April 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773
	)	7 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23 and 25 of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant John I. Sanger hereby moves for oral argument on the following issues:

I. Whether Staff Sergeant Sanger's conviction should be set aside and dismissed with prejudice because the regulation that he was prosecuted for violating, Air Force Instruction 51-503 ¶ 3.4, was facially unconstitutional under the First Amendment.

II. Whether Staff Sergeant Sanger's conviction should be set aside and dismissed with prejudice because Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 was unconstitutional as applied because the specification charged by the Government only alleged constitutionally protected speech.

WHEREFORE, Staff Sergeant Sanger respectfully requests that this Honorable Court grant the motion for oral argument.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 April 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	OPPOSITION TO MOTION FOR ORAL ARGUMENT
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN I. SANGER** United States Air Force *Appellant.*	)	No. ACM S32773 14 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23(c), 23.3(a), and 25 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument.

Opposition to Motion for Oral Argument

Appellant's motion for oral argument should be denied for three reasons: (1) Appellant offers no reasons why oral argument would be helpful to this Court; (2) Appellant waived the assignments of error at issue on appeal; and (3) further delay is unwarranted in this case.

First, Appellant has failed to articulate why oral argument is necessary or would be helpful to this Court when the issues has been fully briefed by both sides. Second, Appellant's motion for oral argument is unwarranted because Appellant, by entering into a plea agreement, waived any constitutional challenges, including First Amendment defenses. (App. Ex. II at 2.) Trial defense counsel told the military judge "that pursuant to the terms of the plea agreement, the defense is not making a motion to dismiss based on failure to state and offense." (R. at 47.) Trial defense counsel stated that a motion to dismiss for failure to state an offense would also include any constitutional concerns. (R at 48.) Appellant agreed that the First Amendment did not provide him with a defense. (R. at 35.) For these reasons, Appellant waived the First

Amendment defenses that he is raising for the first time on appeal. Given waiver, oral argument is unnecessary to address the assignments of error implicating the First Amendment.

Third and lastly, additional delays are unwarranted. Considering this Court's obligations under United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), partaking in any further delay to schedule and conduct an unwarranted oral argument in this case is unnecessary.

This Court has the record of trial and the written submissions from both parties to make a decision in this case. Here, the positions of each party are clear, and this Court should proceed to issue a decision in due course of its deliberations without the further delay of an oral argument.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 April 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32773**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John I. SANGER	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

This court specifies the following issue for supplemental briefing in the above-captioned case:

> WHETHER APPELLANT'S PLEA OF GUILTY WAS PROVIDENT.

Accordingly, it is by the court on this 29th day of May, 2025,

ORDERED:

Appellant and Appellee shall file briefs on the specified issue with this court. Briefs will include a discussion on the third element of the offense: willful dereliction of duty.

Both briefs are due **not later than 15 June 2025**. No further briefs will be permitted without leave from the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' MOTION
Appellee,	)	FOR AN ENLARGEMENT
	)	OF TIME (FIRST)
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
JOHN I. SANGER	)	No. ACM S32773
United States Air Force	)	
Appellant.	)	2 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 7-day enlargement of time, to respond in the above captioned case. This case was docketed with the Court on 21 March 2024. Since docketing, Appellant has been granted nine enlargements of time. Appellant filed his brief with this Court on 28 February 2025. And the United States filed its answer brief on 31 March 2025. Since then, this Court on Thursday, 29 May 2025 ordered supplemental briefing on the following specified issue: Whether Appellant's plea of guilty was provident.

This is the United States' first request for an enlargement of time. As of the date of this request, 438 days have elapsed since docketing. The United States' response for the specified issue is 15 June 2025. If the enlargement of time is granted the United States' response will be due 22 June 2025, and 458 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. Before this Specified Issue order was issued, undersigned counsel had preapproved leave and will be on overseas leave status for 11 days, from 3 June 2025 to 13 June 2025. On Friday, 30 May 2025, the day after this Court issued its Specified Issue order, undersigned counsel filed a 56-page answer brief for United States v. Washington, USCA Dkt. No. 25-0044/AF at the United States Court of Appeals

for the Armed Forces. As a result, undersigned counsel has not been able to begin working on the specified issue until today and starts her pre-approved overseas leave tomorrow. This case is undersigned counsel's first priority. Due to office workload, there is no other appellate government counsel to work on the specified issue and file a brief soon. Further, undersigned counsel is already familiar with the record, responded to Appellant's assignments of error, and therefore is best suited to provide an answer responsive to this Court's specified issue. The United States does not oppose a 7-day EOT also being granted to Appellant.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 2 June 2025.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME TO FILE SUPPLEMENTAL BRIEF**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant.*	)	No. ACM S32773 9 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) John I. Sanger, hereby moves for his ninth enlargement of time to file his supplemental brief. SSgt Sanger requests an enlargement for a period of 6 days, which will end on **22 June 2025**.[1] The record of trial was docketed with this Court on 21 March 2024. From the date of docketing to the present date, 445 days have elapsed. On the date requested, 458 days will have elapsed. On 29 May 2025, this Court ordered for supplemental briefing to be filed by both SSgt Sanger and the Government by 15 June 2025.

On 18 October 2023, Staff Sergeant (SSgt) John Sanger was convicted, pursuant to his plea, at a special court-martial convened at Fairchild Air Force Base, Washington of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice. (R. at 57.) The military judge sentenced SSgt Sanger to a bad conduct discharge. (R. at 141.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

[1] SSgt Sanger's request is based on this Court's deadline set under the order for supplemental briefing which is 15 June 2025. Because that date falls on a Sunday, the current filing deadline is 16 June 2025 per Rule 15 of this Court's Rules of Practice and Procedure.

The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. SSgt Sanger is not currently in confinement. SSgt Sanger has been advised of his right to a timely appeal, as well as the request for an enlargement of time. SSgt Sanger has agreed to the request for an enlargement of time. Furthermore, counsel has been in communication with SSgt Sanger concerning the status of this case's progress. Counsel asserts attorney-client privilege concerning the substance of those communications.

Undersigned counsel is currently assigned 17 cases; 2 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Campbell*, ACM 40642 – The record of trial includes an 892-page transcript. There are 11 prosecution exhibits, 19 defense exhibits, 18 appellate exhibits, and one court exhibit.
2) *United States v. Waddell*, ACM 24061 – The record of trial includes a transcript that is 148 pages in length. There are three prosecution exhibits, 11 defense exhibits, and four appellate exhibits.

On 9 June 2025, this Court granted the Government an enlargement of time to file its supplemental brief by 22 June 2025 without opposition. The Government's request indicated that the Government did not oppose SSgt Sanger receiving the same enlargement of time. SSgt Sanger requests an enlargement of time to fall on the same date granted for the Government in order to equitably receive the same benefit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 June 2025.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE SUPPLEMENTAL BRIEF
v.	)	
Staff Sergeant (E-5) **JOHN I. SANGER, USAF,** *Appellant.*	)	Before Panel No. 1
	)	No. ACM S32773
	)	10 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Supplemental Brief.

WHEREFORE, the United States respectfully requests that this Court grant Appellant's enlargement motion.

[redacted]

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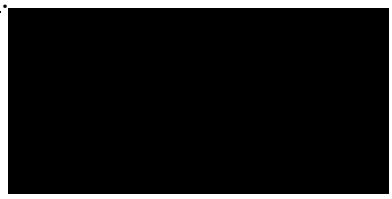
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 June 2025.



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United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO THE COURT'S SPECIFIED ISSUE
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN I. SANGER** United States Air Force *Appellant.*	)	No. ACM S32773 23 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

SPECIFIED ISSUE

WHETHER APPELLANT'S PLEA OF GUILTY WAS PROVIDENT.

STATEMENT OF CASE

Pursuant to his pleas, a military judge found Appellant guilty of one charge and one in violation of Article 92, UCMJ. (*Entry of Judgment*, 6 November 2023, ROT, Vol. 1.) Appellant was charged with the following specification:

> In that Staff Sergeant John I. Sanger, United States Air Force, 92d Logistics Readiness Squadron, who knew of his duties at or near Spokane, Washington, on divers occasions between on or about 07 February 2020 and 26 April 2022, was derelict in the performance of those duties in that he willfully failed to refrain from actively advocating supremacist and extremist ideology and causes, as it was his duty to do.

(Id.) The military judge sentenced Appellant to reduction to the grade of E-1 and a bad conduct discharge. (Id.)

Appellant entered into a plea agreement with the convening authority. (App. Ex. II.) On 28 February 2025, Appellant submitted the following three assignments of error: 1) Whether

Appellant's conviction should be set aside and dismissed with prejudice because the regulation that he was prosecuted for violating, Air Force Instruction 51-503 ¶ 3.4, was facially unconstitutional under the First Amendment; 2) Whether Appellant's conviction should be set aside and dismissed with prejudice because Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 was unconstitutional as applied because the specification charged by the Government only alleged constitutionally protected speech; and 3) Whether the entry of judgment erroneously directed Appellant to be subject to criminal history indexing for a non-qualifying offense under Air Force Manual 72-102. (*Appellant's Brief*, 28 February 2025.) The United States maintains its position outlined in its Answer Brief filed with this Court on 31 March 2025 that AFI 51-508 was constitutional and lawfully prohibited unprotected speech as applied to military service members; as applied to Appellant, Article 92 was constitutional because the specification charged alleged unprotected speech; and Appellant was lawfully criminally indexed for a qualifying offense. (*United States' Answer*, 31 March 2025.) On 29 May 2025, this Court ordered additional briefing about the following specified issue: Whether Appellant's plea of guilty was provident.[1] (*Order*, 29 May 2025.)

STATEMENT OF FACTS

Air Force Instruction 51-508

The Air Force prohibited service members from advocating supremacist and extremist ideology or causes. Air Force Instruction 51-508 (AFI 51-508)*, Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel,* paragraph 3.4.1.1 (12 October 2018).

[1] The Court requested that the briefs include a discussion about the third element of the offense: willful dereliction of duty.

Relevant portions of AFI 51-508 are as follows:

AFI51-508 12 OCTOBER 2018 **15**

3.4.1. Military personnel must reject active participation in criminal gangs and in other organizations that (**Note:** Military members who violate this paragraph, to include any of its subparagraphs, are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the UCMJ):

3.4.1.1. Advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes;

3.4.1.2. Attempt to create illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin;

3.4.1.3. Advocate the use of force, violence, or criminal activity; or

3.4.1.4. Otherwise engage in efforts to deprive individuals of their civil rights.

3.4.2. Active participation in such gangs or organizations is prohibited. **(T-0). Note:** Military members who violate this paragraph, to include any of its subparagraphs, are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the UCMJ.

3.4.2.1. Active participation includes, but is not limited to:

3.4.2.1.1. Fundraising for, or donating money to, the organization;

3.4.2.1.2. Demonstrating or rallying;

3.4.2.1.3. Recruiting, training, organizing, or leading members;

3.4.2.1.4. Distributing material (including posting on-line);

3.4.2.1.5. Knowingly wearing gang colors or clothing;

3.4.2.1.6. Having tattoos or body markings associated with such gangs or organizations; or

3.4.2.1.7. Otherwise engaging in activities in furtherance of the objective of such gangs organizations that are detrimental to good order, discipline, or mission accomplishment or are incompatible with military service.

Plea Agreement

Appellant entered into a plea agreement with the government. In exchange for pleading guilty to the charge and its specification of willful dereliction of duty in violation of Article 92, UCMJ, at a special court-martial, the military judge had to adjudge a bad-conduct discharge and no term of confinement as part of the sentence. (App. Ex. II.) The military judge accepted the plea agreement and its terms. (R. at 55.)

Stipulation of Fact

As part of the plea agreement, Appellant entered into a stipulation of fact. (App. Ex. II.) Appellant agreed that the matters in the stipulation of fact are true and correct to the best of his knowledge and belief. (R. at 17.) Below are examples of Appellant's engagement in activities in violation of AFI 51-508 as outlined in the stipulation of fact.

Between on or about 7 February 2020 and 26 April 2022 Appellant was part of a national white extremist group called "Pacific Northwest Imperative." (Pros. Ex 1 at 1-2.) Within this national white extremist group, Appellant was also a part of its subgroups: a regional subgroup called "Pacific Northwest Tribal Chat;" a local subgroup called "Sushi Boys;" and a sub-local group called "The Sanctuary." (Id.) Many times, Appellant participated in group text chat sessions and met with persons, online and in person, associated with these groups using social media accounts such as Telegram – an encrypted message application on social media. (R. at 28; Pros. Ex. 1 at 1-5.) Appellant met with these groups, discussed their shared ideology and plans, and advocated for their ideology and causes. (Pros. Ex. 1 at 2.)

Appellant repeatedly expressed his distaste for Jewish and African-American individuals. (Pros Ex. 1 at 2-5.) Appellant also stated that he was against the COVID-19 vaccination and encouraged non-white people to receive the vaccination because it would cause them to be sterile. (Pros. Ex 1 at 2.) Appellant on numerous occasions reposted posts on social media with symbols associated with Nazism. (Id.)

Moreover, Appellant's posts on social media, mainly on Telegram, contained rhetoric pertaining to the United States military. (Pros. Ex 1 at 3.) While deployed at Al Dhafra Air Base, United Emirates, Appellant shared a post on Telegram that mentioned:

> All you people thinking the military will do a blackout and arrest pedophile elites and traitorous politicians are beyond delusional. Every head of a military branch is on board with labeling white men domestic terrorists for daring to have their voice heard. The system WILL not attack itself. Your vote will NEVER matter again. And most of all, they are coming to terrorize you and your family soon.

(Pros. Ex. 1 at 3.) Appellant reposted a post on his Telegram account containing images of military personnel responding to the United States Capitol riot on 6 January 2021 with the following caption, "A 78yr old man campaigned from his basement. Picks the most unpopular VP. Received the most votes in history . . . Has 25,000 troops to make sure it goes the way he wants. And nobody is allowed to question it . . . ." (Id.)

After deployment, near Spokane, Washington, Appellant messaged a Telegram user, stating, "We aren't even allowed to criticize public officials anymore. . . It is my sincerest hope that one day we will hunt them down." (Pro Ex. 1 at 3.) Appellant messaged another Telegram user and mentioned someone who allegedly planned to detonate a bomb in Washington D.C. and stated, "Hopefully he inspires others." (Id.)

Then Appellant posted a statement on Telegram that cited Mein Kampf written by Adolf Hitler, and advocated that a small percentage of the American population could engage in a revolutionary war against the government of the United States of America. (Pros. Ex. 1 at 3.)

On 23 October 2021, Appellant introduced an undercover agent (UCA) working for the Air Force Office of Special Investigations in person to several of his friends who were part of the group called "The Sushi Boys." (R. at 39; Pros. Ex. 1 at 4.) Appellant facilitated a group chat with the leaders of the Pacific Northwest Tribal Chat and vouched for the UCA before the UCA was also accepted into this group. (Pros. Ex. 1 at 4.)

On 27 October 2021 near Spokane, Washington, Appellant made threats against those who enforced government COVID-19 mask mandates:

> They think they have zero consequences. What if there were real consequences for imposing these tyrannical measures on people and destroying their lives as an agenda? We as a people, need to figure out any and all means that we can inflict real material losses on these entities. We need to figure out who they are, figure out who [sic] they are made of, and target individuals, offices, facilities, vehicles, infrastructure. All of it.

(Id. at 4.) In that same conversation, Appellant mentioned that he wanted to do more than talk online. (Id.) Appellant wanted to "fucking kill people." (Id.) Appellant described African-Americans as "an infestation." (Id.) Appellant then stated:

> The idea is to establish a new nation for whites because its already such a densely populated white region. From there you can start other smaller tribes that grew across the country that are supported by the motherland. But that would be well after the new nation was established and the new nation was here to stay.

(Id.)

On 5 November 2021, near Spokane, Washington, Appellant witnessed members of the "The Sushi Boys" damage public property with white supremacist graffiti and stickers. (Id.) A few days later, Appellant continued to make the following racist comments:

> I don't hate every single Jew without reservation. I just hate what they've done to Western civilization, and I hate their nature, and I hate them as a whole.
>
> The blacks know they can say and do whatever they want and there's no consequence. They take advantage of all of it. They've figured out that in the military; they are actually in charge. As far as the military goes, they are basically worthless.
>
> People need to think like insurgents. Where can I attack? Who can I attack with? What are potential targets? Everyone needs to realize they are... that to the government, they are the enemy. And if you are a friend of freedom, that means to stop playing by the rules. Now that doesn't mean to slaughter people…They are going to call you a terrorist. As a matter of fact, we're terrorists without even doing anything. Just for believing that we should survive as a race. We're terrorists . . . so that bridge has already been crossed.

(Id.)

A couple of months later, Appellant made various comments that discussed obtaining body armor plates from an Air Force lieutenant from Security Forces. (Pros. Ex. 1 at 5.) Appellant, near Spokane, Washington, said that "if you have the OPSEC, you have the awareness, and if you have, like, the recon, on a specific target, you can make something happen." (Id.) Appellant also mentioned that the 92nd Security Forces Squadron did not have clear accountability over its gear other than firearms, hinting that Appellant could obtain gear from the military to support his white supremacist advocacy. (Id.)

Appellant reiterated his disdain towards the COVID-19 vaccine, and he wanted to design a patch for those who would never submit to COVID-19 vaccination. (Id.) Appellant said, "I will spill my blood, and I will spill blood, to keep my blood in non-compliance." (Id.)

During an interview with law enforcement agents, Appellant said that he had placed a sticker in downtown Spokane stating, "It's ok to be white," when explaining that he was concerned that the white race was dying out. (Id.)

Plea Colloquy

Pursuant to a plea agreement, Appellant entered a plea of guilty to willful dereliction of duty in violation of Article 92, UCMJ. (R. at 11-12.) The military judge explained the following elements of the offense to Appellant: 1) that Appellant had certain prescribed duties to refrain from actively advocating supremacist and extremist ideology and causes; 2) that Appellant actually knew of the assigned duties; and 3) that on diverse occasions between on or about 7 February 2020 and 26 April 2022, at or near Spokane Washington, Appellant was willfully derelict in the performance of these duties by failing to refrain from actively advocating supremacist and extremist ideology and causes. (R. at 20.)

Next, the military judge defined the terms "divers," "dereliction," and "willfully." (R. at 20.) The military judge defined willfully as "intentionally. It refers to doing of an act knowingly and purposefully, specifically intending the natural and probably consequences of the act." (R. at 20.) Appellant understood these terms as defined by the military judge. (R. at 21.)

Appellant admitted that between 7 February 2020 and 26 April 2022, he was involved in online group chats and an online community of white extremists. (R. at 21.) Appellant also explained that he met with some individuals from these groups, shot firearms, and discussed beliefs, plans, and different ways to advocate for white supremacist ideology. (R. at 21.) Appellant said that his participation included posting messages, communicating with other people, reposting messages on social media, and advocating for those causes online. (R. at 21.) Appellant affirmed that "as an Airman, that was not something that [he] was supposed to be engaged in." (R. at 21.) Appellant then agreed that he had a duty to refrain from actively advocating supremacist and extremist ideology and causes. (R. at 22.) Appellant understood that there were rules for what Airman are allowed to do as a representative of the Air Force. (R. at 22.)

Appellant explained that although he was unaware of the specific instruction at the time barring such activity, he had been made aware of the duty to refrain from the prohibited activity charged. (R. at 22.) Appellant confirmed that the instruction he referenced was AFI 51-508 and although he did not know that the instruction existed, he still knew that there were rules that he could not engaged in supremacist and extremist ideology and causes. (R. at 23.) Appellant understood that at the time he "was doing something wrong, but I didn't know, specifically, what it pertained to." (R. at 24.) Essentially Appellant did not recall the specific regulation that regulated political activity and speech, but he knew he had a duty as an Airman that he could not

be making comments about supremacist and extremist ideology and causes. (R. at 24.) When asked by the military judge, "And did you know, specifically, that although you couldn't cite me the regulation at that point, that you still had a duty as an Airman at that point not to be making those comments," Appellant responded, "Yes, Your Honor." (R. at 24.)

During the plea colloquy the military judge read pertinent parts of AFI 51-508 to Appellant. The military judge highlighted the following terms:

> Paragraph 3.4 of that regulation states that military personnel must not actively advocate supremacist, extremist, or criminal gang, doctrine, ideology, or causes, including those that advance, encourage, or advocate a legal discrimination based on race, creed, color, sex, religion, ethnicity or national origin, or those that advance, encourage, or advocate the use of force, violence, or criminal activity, or otherwise advance efforts to deprive individuals of their civil liberties.
>
> Military personnel -- skipping down to paragraph 9 3.4.1 -- military personnel must reject active participation in criminal gangs and in other organizations that advocate supremacist, extremist, or criminal gain, doctrine, ideology or causes, attempts to create illegal discrimination based on race, creed, color, sex, religion, ethnicity or national origin, or advocate the use of force, violence, or criminal activity, or otherwise engage in efforts to deprive individuals of their civil rights.
>
> And, then, lastly, I'm going to read two definitions to you from paragraph 3.4.2.3: A supremacist doctrine, ideology, or cause is characterized by, but is not limited to, having a fundamental tenant of its nature that particular members of one race, color, gender, national origin or ethnic group are genetically superior to others. Members in such organizations is usually restricted to those belonging to that particular race, color, gender, national origin, or ethnic group.
>
> And, lastly, the next paragraph, an extremist doctrine, ideology, or cause is characterized by, but is not limited to, a common belief which might otherwise be politically or socially acceptable, but that espouses the use or threat of force or violence to obtain their goals.

(R. at 25-26.) Appellant told the military judge that he understood the definitions outlined in the regulation and agreed that his actions during the charged time framed violated AFI 51-508. (R. at 26.) Appellant also admitted that even though he was not aware of AFI 51-508 at the time, he knew that he was "not allowed to actively advocate in supremacist and extremist ideology." (R. at 26.)

Next, Appellant and the military judge had a discussion in which Appellant explained how he actively advocated supremacist and extremist ideologies. Appellant explained that he had an anonymous account online that would repost posts from other extremists advocating for white supremacist causes and violence. (R. at 27.) Appellant would meet with individuals from these extremist groups and "put stickers in the form of activism" at or near Spokane, Washington. (R. at 27.) Appellant explained that he would meet with people from these groups to discuss how to further that agenda, and he tried to find other people to bring into the group chats. (R. at 27.) Appellant met with people from these groups seven or more times. (R. at 27.) When the military judge asked if Appellant felt that he was advocating supremacist and extremist ideology and causes, Appellant agreed. (R. at 27.)

The military judge also discussed the stipulation of fact with Appellant. For instance, the stipulation of fact, paragraph 6, stated that Appellant shared a video, but he was unaware of the implications of the symbols, knows as a Sonnenrad[2] or "black sun" symbol, in that video. (R. at 28-29; Pros. Ex. 1 at 2.) Still, as described to the military judge, Appellant felt that he was actively advocating at that point because Appellant knew that the Sonnenrad symbol was used by

[2] The Sonnenrad was a symbol that represented the Schutzstaffel, Adolf Hitler's major paramilitary organization. This symbol has since been recognized as a symbol of hate and Nazism. (Pros. Ex. 1 at 2.)

that community. (R. at 29; Pros. Ex. 1 at 2.) Appellant was unaware of the specifics of the symbol, but knew the symbol was associated with the white supremacist community.

The military judge sought clarification from Appellant because the stipulation of fact referenced times Appellant deleted social media postings or did not understand what certain symbols meant. (R. at 29.) The military judge therefore noted that if Appellant did not understand what certain symbols meant or deleted postings from social media groups and chats then perhaps Appellant was not advocating at that point. (R. at 29-30.) Appellant understood the military judge's concerns. (R. at 30.) That said, Appellant told the military judge that he "had a problem with impulsively posting things that I just would read the first couple of lines, thinking nothing of it, and then going back over it and realizing everything that it was saying, that that wasn't the message that I was trying to get across." (R. at 30.) Appellant mentioned that over time he:

> Went back and deleted things, and also I had periods of time where I was more extreme, you could say and, then, I started to have a change of heart where, "okay, I don't espouse this any longer," so would go back over and delete them. That is the reason; so impulsivity and wanting to - - not exactly delete the record – but just say that I - - 'Now that I've looked at this, I don't want to post this.

(R. at 30-31.) As for paragraph 6 of the stipulation of fact describing a post with the "black sun," Appellant said that he took it down because that was not what he meant to say. (R. at 31.) Even though Appellant did not know specifically what the black sun symbol stood for at the time of the post, he agreed with the military judge that he still knew that this symbol was one that people of the supremacist group used and that he "[published] it with that purpose behind it." (R. at 34.)

As for paragraphs 8-15 in the stipulation of fact that referenced Appellant's actions while deployed at Al Dhafra Air Base, the military judge said that although he would consider these

facts, the facts would not serve as a basis for providing a sentence because it was not near Spokane, Washington as charged. (R. at 32.)

Appellant agreed with the military judge that he was charged with willful dereliction that required him to knowingly or intentionally fail to perform his duty. (R. at 32.) Appellant also confirmed with the military judge that he in fact failed to obey that duty. (R. at 32.)

The military judge then discussed the involvement of an undercover agent. (R. at 36.) Appellant did not know that the undercover agent was an agent with the Air Force Office of Special Investigations. (R. at 36.) Appellant denied that a defense of entrapment existed in his case. (R. at 36-37.) Appellant explained that he was already involved with extremist groups before the undercover agent being involved and therefore no defense of entrapment existed. (R. at 38-39.)

No one authorized or forced Appellant to engage in supremacist and extremist activities. (R. at 40.) Nor did Appellant have any legal justification or excuse for failing to perform his duty. (R. at 40.) Once again, Appellant affirmed that he actually knew of this duty to refrain from supremacist and extremist ideology and causes. (R. at 40.) Appellant admitted that on diverse occasions between 7 February 2020 and 26 April 2022, at or near Spokane, Washington, he was willfully derelict in the performance of his duty by failing to refrain from actively advocating supremacist and extremist ideology and causes. (R. at 41.)

The military judge confirmed that Appellant was satisfied with his defense counsel, and Appellant affirmed that he is voluntarily pleading guilty of his own free will. (R. at 55-56.) Appellant understood that even though he believed that he was guilty, he had the legal right to plead not guilty and to place the burden of proving his guilt beyond a reasonable doubt with the government. (R. at 56.)

With his said, the military judge found that Appellant's plea of guilty was made voluntarily and with full knowledge of its meaning and effect. (R. at 57.) As a result, the military judge found Appellant's plea of guilty provident. (R. at 57.) Still, the military judge advised Appellant that he may request to withdraw his plea of guilty at any time before the sentence was announced. (R. at 57.)

ARGUMENT

APPELLANT'S PLEA WAS PROVIDENT.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321. Appellate courts give military judges "significant discretion in deciding whether to accept an accused's guilty pleas." United States v. Phillips, 74 M.J. 20, 21 (C.A.A.F. 2015).

Law and Analysis

Appellant's plea colloquy with the military judge, along with the stipulation of fact, established a factual basis to show that Appellant was willfully derelict in the performance of his duties by failing to refrain from actively advocating supremacist and extremist ideology and causes. A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support

that plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A.1994) (citation omitted); *see also* United States v. Davenport, 9 M.J. 364, 366-67 (C.M.A. 1980) (explaining that an accused's admissions during a plea colloquy must establish a factual predicate to support his plea of guilty). In reviewing the providence of a guilty plea, this Court considers an appellant's colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007). To ensure that a plea is provident, the military judge may also consider a stipulation of fact. United States v. Hardeman, 59 M.J. 389, 391 (C.A.A.F. 2004).

To find Appellant's plea of guilty provident for an Article 92, UCMJ violation for dereliction of duty, his guilty plea had to established a factual predicate for the following elements: 1) that he had certain duties; 2) that the accused knew or reasonably should have known of the duties; and 3) that the accused was willfully derelict in the performance of those duties. Manual for Courts-Martial, United States part IV. para. 18.b.(3)(a)-(c) (2019 ed.) (MCM).

A. Appellant had a duty to refrain from advocating supremacist and extremist ideology and causes.

AFI 51-508 prohibited service members from advocating supremacist and extremist ideology or causes. AFI 51-508, para. 3.4.1.1. With this regulation in place, a duty was in place in which Appellant had to refrain from engaging in activities that advocated supremacist and extremist ideology or causes.

B. Appellant actually knew of the duty to refrain from advocating supremacist and extremist ideology and causes.

Appellant knew that there were rules in place that regulated supremacist and extremist activity even though he did not know the exact regulation that contained those rules when he

engaged in prohibited activities. (R. at 23.) Appellant agreed that even though he could not cite the specific regulation, he understood that he had a duty as an Airman that he could not be making comments about supremacist and extremist ideology and causes. (R. at 23-24.) When specifically asked by the military judge, "And did you know, specifically, that although you couldn't cite me the regulation at that point, that you still had a duty as an Airman at that point not to be making those comments," Appellant responded, "Yes, Your Honor." (R. at 24.) In sum, Appellant through his colloquy with the military judge and stipulation of fact affirmed that he knew of the duty to refrain from actively advocating supremacist and extremist ideology and causes.

C. Appellant was willfully derelict in the performance of those duties by failing to refrain from actively advocating supremacist and extremist ideology and causes, as it was his duty to do so.

There is no dispute that Appellant willfully and purposefully engaged with white supremacist groups that advocated white extremist views. Appellant admitted that he regularly chatted and met with national white extremist groups, shared supremist and extremist ideology, and Appellant repeatedly expressed his hatred towards Jewish and African-American individuals. (Pros. Ex. 1 at 2-5.) Appellant stated that he would "repost posts from other extremist accounts advocating for causes, advocating for violence," he "went out with other individuals to put stickers up in the form of activism," "also met with other people that had similar ideals" at least "seven or more times," and actively recruited others to "bring into those group chats." (R. at 27.) Appellant added, "Those are some of the examples of actively advocating that come to mind," an indication that there were other instances of this conduct. Appellant also agreed that during these discussions he was advocating with those people for supremacist and extremist ideology and causes. (R. at 27.)

Notably, Appellant admitted that there were times during the charged time frame in which he was more extreme. (R. at 30-31.) And his actions did not just end with posting anonymously online, Appellant admitted that he met with individuals from these white supremacist groups and discussed "beliefs, and plans and different ways to advocate for that ideology." (R. at 21.) This alone provided a factual basis to show that Appellant, on divers occasions, engaged with supremacists groups and actively advocated supremacist and extremist ideas. That said, Appellant placed a sticker in downtown Spokane, Washington, with the words, "It's okay to be white." (Pros. Ex. 1 at 5.) Appellant's advocacy when as far as encouraging members of those groups to engage in vandalism. Appellant witnessed members of "The Sushi Boys" vandalize public property with white supremacist graffiti and stickers from a distance. (Pros Ex. 1 at 4.) Appellant even went as far as discussing with individuals from these groups that he could obtain body armor plates from an Air Force Security Forces lieutenant from the 92nd Security Forces Squadron to keep advocating white supremacist ideology. (Pros. Ex. 1 at 5.)

Furthermore, not only did Appellant intentionally engage in white supremacist advocacy, he did so all with the full knowledge that he had a duty to refrain from engaging in such activities. As noted above, even though he did not know the specific regulation encompassing the duty, Appellant still admitted that he knew at the time of his actions that there were rules in place that forbid his extremist activity. (R. at 23.) Again, when asked by the military judge, "And even though you weren't aware of 51-508 at the time, do you agree that you were aware that you were not allowed to actively advocate in supremacist and extremist ideology," Appellant replied, "Yes. Yes, Your Honor." (R. at 26.)

For these reasons, Appellant was derelict when he failed to refrain from advocating supremacist and extremist ideology and causes, as it was his duty to do so. The military judge did not abuse his discretion when he found Appellant willfully failed to refrain from supremacist and extremist advocacy.

D. <u>There was no substantial basis in law and fact to undermine Appellant's plea. Appellant established a factual predicate to support his plea of guilty.</u>

Appellant's plea of guilty "must be analyzed in terms of providence of his plea, not sufficiency of the evidence." <u>United States v. Faircloth</u>, 45 M.J. 172, 174 (C.A.A.F. 1996.) R.C.M. 910(e) requires that the military judge explain the elements of the offense and ensure that there is "a factual basis for the plea." An "accused must be convinced of, and be able to describe all the necessary facts to establish guilt." R.C.M. 910(e) Discussion. In other words, there is no requirement that any witnesses be called or independent evidence be admitted establishing the factual predicate for a guilty plea. A guilty plea is sufficiently established "if the factual circumstances as revealed by the accused himself objective support that plea. . . ." <u>United States v. Davenport</u>, 9 M.J. 364, 367 (C.M.A. 1980). Finally, Article 45(a), UCMJ, requires a military judge to set aside a guilty plea if an accused "sets up matter inconsistent with the plea, or if it appears that he has entered the play of guilty improvidently or through lack of understanding of its meaning and effect."

As shown above, there is no substantial basis in law and fact to underling Appellant's provident plea, as Appellant's colloquy with the military judge, along with the Stipulation of Fact, establish a factual predicate to support Appellant's plea. Further, in this case, Appellant did not set up matters inconsistent with his plea of guilty. Notably, there were three points within Appellant's plea in which the military judge took additional care to expand upon: (1)

Appellant's knowledge of the duty in question; (2) First Amendment implications; and (3) Appellant's understanding as to what certain symbols meant in some of his social media posts.

As to whether or not Appellant actually knew about his duty to refrain from engaging in supremist activity at the time he was engaging in this activity, the military judge, as noted above, asked Appellant multiple questions regarding his knowledge of the duty. As shown, by the end of their discussion, the record clearly showed Appellant was aware of this duty when he engaged in his extremist activity and willfully violated that duty when he willfully engaged in those activities. Importantly, while the record does reflect that Appellant did not know about AFI 51-508 at the time of his activities, his knowledge of the specific regulation is not required to be guilty of this dereliction of duty defense. In United States v. Markley, 40 M.J. 581, 582 (A.F.C.M.R. 1994), this Court's predecessor held that "nowhere" in the elements of a dereliction of duty offense is " there a requirement that the accused be advised as to the source of his duty." Instead, the Court held it "is sufficient if he is aware that there is such a duty." Here, thanks in part to the additional questioning by the military judge, the record is replete with Appellant's understanding that, *at the time of his actions*, he knew he had a duty to refrain from engaging in supremist and extremist behavior and willfully engaged in them anyway.

The military judge also discussed the First Amendment with Appellant, namely to ensure Appellant was aware of his rights under the First Amendment such as freedom of speech and freedom of assembly, and any defenses that could arise from the First Amendment. (R. at 34-35.) When asked whether he thought his conduct was constitutionally protected, Appellant, after conferring with his counsel, stated, "I understand there's a First Amendment, but I also understand there are more strict rules for service members, so no." (R. at 35.) Appellant also agreed that he did not feel the First Amendment in any way provided him a defense to the words

and the actions that he took, and further agreed that a duty to refrain from actively advocating supremacist and extremist ideology and cause is a valid military duty that he had a duty to obey. (R. at 35.)

The military judge also had discussions with Appellant about whether Appellant knew what certain symbols meant when he reposted them on social media and the fact that Appellant deleted posts after posting them on social media. But this did not undermine the plea of guilty. There were other instances during the charged timeframe in which Appellant was aware of the meaning of content he posted at the time he posted it, and then did not delete the post after it was published on social media. For example, Appellant posted a statement on Telegram that cited Mein Kampf, written by Adolf Hitler, furthering the cause that a small percentage of the American population engage in a revolutionary war against the government of the United States. (Pros. Ex. 1 at 3.) Appellant also reposted a post on his Telegram account containing images of military personnel responding to the United States Capitol riot on 6 January 2021 with the caption: "A 78yr old man campaigned from his basement. Picks the most unpopular VP. Received the most votes in history. . . Has 25,000 troops to make sure it goes the way he wants. And nobody is allowed to question it. . . ." (Pros. Ex. 1 at 3.)

Yet, even for those posts that he did eventually delete, Appellant still admitted that he was still "actively advocating" for "the cause" even if he did not understand the significance of some of the symbols contained in what he posted. (*See* R. at 31.) He also agreed that even though he did not know exactly what a symbol or stood for, he still knew it was a symbol that people of that group used to further their purposes. (R. at 34.)

Appellant did not just simply post on social media. Instead, his willful and purposeful involvement with white extremist evolved into in person communications, such as planning and

advocating for white supremacist causes and even recruiting others to join. Appellant in his plea colloquy admitted as much as he described his continuous role in actively advocating for white supremacist causes:

> Between the dates of 7 February 2020 and 26 April 2022, I was involved in online group chats and online community of white extremists. I met with some of those individuals, and we also shot firearms, and we discussed our beliefs and plans and different ways to *advocate* for that ideology. My participation involved posting messages, communicating with other people, reposting messages on social media, and *advocating* for those causes online. At the time, I knew that as an Airman, that was not something that I was supposed to be engaged in.

(R. at 21) (emphasis added). Appellant's admissions also revealed that he himself believed that he was guilty. He knew his willful actions violated his duty to refrain from supremacist and extremist activity. (R. at 32.) Thus, Appellant's admissions provided the necessary facts to support his plea as required by Article 45(a), UCMJ and R.C.M. 910(e).

In sum, Appellant established the necessary facts to support his plea of guilty. Appellant knew of the duty to refrain from extremist activities and advocacy. Further, his admissions along with the stipulation of fact demonstrated Appellant's willful failure to refrain from such advocacy. Additionally, the military judge did not abuse his discretion in accepting Appellant's plea of guilty as the military judge properly determined that there was an adequate basis in law and fat to support the plea. Here, the military judge's discussion with Appellant including additional questioning to ensure Appellant provided, and the record included, sufficient facts to show that: (1) Appellant specifically knew of his duty; (2) Appellant willfully engaged in activity that he knew was extremist behavior; and (3) Appellant knew at the time he was committing the behavior that he was willfully violating his known duty to not engage in that behavior.

Accordingly, the record does not show a substantial basis to question the providence of the plea or find the military judge abused his discretion in accepting the plea.

For these reasons, this Court should find Appellant's plea of guilty provident.

CONCLUSION

The United States respectfully requests that this Honorable Court affirm the finding and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 June 2025.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**SUPPLEMENTAL BRIEF ON ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **JOHN I. SANGER,** United States Air Force, *Appellant*.	)	No. ACM S32773
	)	23 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Appellant, Staff Sergeant (SSgt) John I. Sanger, pursuant to this Court's order on 29 May 2025, files this supplemental brief. In addition to the arguments in his opening and reply briefs, SSgt Sanger offers the following.

SSGT SANGER'S GUILTY PLEA FOR WILLFUL DERELICTION OF DUTY WAS IMPROVIDENT.

Additional Facts

SSgt Sanger served in the 92d Logistic Readiness Squadron with no legal training or law enforcement background. (Pros. Ex. 2.) During the providence inquiry, SSgt Sanger denied reading or even knowing about the existence of Air Force Instruction (AFI) 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel* (October 12, 2018). (R. at 22, 26.) The military judge asked SSgt Sanger if "knew that there were rules that you couldn't do what you did?" to which SSgt Sanger replied "yes." (R. at 23.) The military judge did not clarify what specific speech or conduct he was referring to when he asked this question. SSgt Sanger later elaborated that he "did not realize that [his] anonymous statements online were in violation of any regulation." (R. at 24.) He also stated, "I understood I was doing something wrong, but I didn't know, specifically, what it pertained to." (R. at 24.) The military judge

followed this up by reading large portions of AFI 51-508, discussing the prohibition on active advocacy of supremacist and extremist ideology. (R. at 25-26.) The military judge's summation of the regulation had no discussion of any First Amendment protections, nor did it mention any military specific impacts of SSgt Sanger's speech. When asked how he violated the regulation, SSgt Sanger was only able to speak to his anonymous online postings, his meeting with other individuals in person to discuss the supremacist agenda, and a single instance of placing a sticker in public in Spokane, Washington. (R at 27.) None of these activities took place in a military setting. The military judge concluded this line of discussion by asking SSgt Sanger if he had "knowingly and intentionally knew [he] had a duty and intentionally failed to do it," which SSgt Sanger affirmed. (R. at 32.)

Only after this point did the military judge begin to discuss the First Amendment, saying that "[w]hat the law tells me is when a charge against a service member may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." (R. at 34.) The military judge did not explain to SSgt Sanger what his rights were under the First Amendment for permissible speech, instead apparently leaving it to SSgt Sanger to discuss with his trial defense counsel. (R. at 35.) The military judge then asked SSgt Sanger if he subjectively believed that the First Amendment protected his conduct, which SSgt Sanger denied. (*Id.*)

During his unsworn statement, SSgt Sanger pointed to his perception that his military leadership was unaware of his activities as a mitigating factor. (R. at 127.) This included the lack of command intervention as required by AFI 51-508, ¶ 3.4.4, if the activities are seen as having the potential to threaten good order and discipline. (R. at 128-29.) The military judge asked SSgt Sanger if he believed his anonymity made the activities constitutionally protected. (R. at 129.)

SSgt Sanger replied, "I understood that even though I was anonymous, I did not have a constitutional right due to the fact that I was in the Air Force and held to a higher standard of speech." (*Id.*) The military followed this up by zeroing in on the general concept of active advocacy, by asking if SSgt Sanger agreed that his in-person activities were "more actively advocating." (*Id.*) SSgt Sanger agreed. (*Id.*) Based on that discussion, the military judge stated, "[j]ust to be crystal clear for the record, I find that the accused's plea is provident." (R. at 130.)

Law & Argument

A guilty plea may not be accepted unless entered providently. Article 45(a), Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 845(a). A guilty plea may be set aside where the record, as a whole, demonstrates a substantial basis in law or fact for questioning it. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A plea lacks a factual basis unless the accused admits circumstances objectively supporting a finding of guilty. *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021). However, even with a sufficient factual basis, the plea may be unsustainable if there is a legal basis for questioning it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). To accept a guilty plea for dereliction of duty in violation of Article 92, U.C.M.J., 10 U.S.C. § 892(3), the military judge must ensure that the following elements were established during the inquiry:

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That accused was willfully derelict in the performance of those duties.

Manual for Courts-Martial (M.C.M.), United States (2019 ed.), Part IV, ¶ 18.b.(3). To be found guilty of willful dereliction of duty, the accused must actually know of the duties. *United States v. Mann*, 50 M.J. 689, 697 (A.F. Ct. Crim. App. 1999).

A. The providence inquiry did not show that SSgt Sanger had knowledge of the duty he was alleged with violating.

Should this Court find that AFI 51-508 had some permissible and relevant application to the duty imposed, SSgt Sanger's plea remained improvident due to lack of knowledge. Willful dereliction of duty requires actual knowledge of the duties imposed. *Mann*, 50 M.J. at 697 ("The elements of willful dereliction of duty [include] that [the accused] knew of the duty."); *United States v. Ferguson*, 40 M.J. 823, 826 (N.M.C.M.R. 1994) ("the enhanced punishment for *willful* dereliction of duty applies only when it is pled and proven that the accused had *actual knowledge* of the duty); *United States v. Ryan*, No. NMCCA 200900007, 2009 CCA LEXIS 351, at *(N-M. Ct. Crim. App. Sep. 29, 2009) ("Actual knowledge is required to prove the dereliction was willful."); *cf. United States v. Howard*, No. ACM 32769, 1998 CCA LEXIS 499, at *8 (A.F. Ct. Crim. App. Dec. 31, 1998) (acknowledging that *negligent* dereliction only requires that accused reasonably should have known of the duty). *See also United States v. Steagall*, No. ARMY 20030879, 2004 CCA LEXIS 394, at *6 (A. Ct. Crim. App. July 30, 2004) (rejecting guilty plea where providence inquiry failed to show that accused knew of his regulatory duty). The requirement for actual knowledge has been articulated by this Court when addressing factual sufficiency in other cases. *United States v. Zier*, No. ACM 21014, 2024 CCA LEXIS 3, at *10 (A.F. Ct. Crim. App. Jan. 5, 2024) (finding factual insufficiency in a negligent dereliction of duty where evidence did not show accused knew of duty charged); *cf. United States v. Gause-Radke*, No. ACM 40343, 2023 CCA LEXIS 384, at *21 (A.F. Ct. Crim. App. Sep. 11, 2023) ("The evidence admitted at trial proves beyond a reasonable doubt that Appellant had actual knowledge of his duty.").

SSgt Sanger repeatedly denied knowledge of AFI 51-508 at the time of the alleged misconduct. (R. 22-23.) Moreover, SSgt Sanger denied knowing that his activities violated the

regulation, instead simply explaining "I understood I was doing something wrong, but I didn't know, specifically, what it pertained to." (R. at 24.) But importantly, mere belief that one's actions are wrong is not enough to establish an accused's understanding of a military duty. *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006). Nor could dereliction of duty be established through a self-imposed belief that a duty existed. *United States v. Dallman*, 34 M.J. 274, 275 (C.A.A.F. 1992).

The element of knowledge was also obscured by the military judge's reliance on AFI 51-508 without any specific clarification about what SSgt Sanger understood his duty to be in light of his First Amendment rights. This is because the text of the regulation did not carve out a narrow prohibition on SSgt Sanger's First Amendment activities that accounted for an impact on the military mission or environment. Instead, AFI 51-508 ¶ 3.4 imposed a blanket prohibition on protected speech. This, apparently, left it to SSgt Sanger to figure out what that meant in relation to his status as a military member. The lack of clarity in the regulation between protected and unprotected activities undermined the knowledge element of the offense. *See United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) ("To withstand a challenge on vagueness grounds, a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed."). An accused could not simply look at the plain text of AFI 51-508 ¶ 3.4 to ascertain a lawful prohibition on protected speech that accounted for the nuance of the military. And, without articulating a narrow limitation based on direct and palpable military impacts, the regulation did not articulate "a duty that would impose criminal liability." *United States v. Baird*, No. ACM 35950, 2006 CCA LEXIS 38, at *3-4 (A.F. Ct. Crim. App. Feb. 28, 2006). The military judge did not inquire as to any other basis for which SSgt Sanger would have had actual knowledge of limitations on his protected speech that cohered with his First Amendment

rights and AFI 51-508. This is especially problematic because no duty was articulated on the record that delineated between constitutionally protected speech, speech that could be prohibited in spite of that protection, and the specific manner that SSgt Sanger's activities may have fallen into a prohibited area. (*Infra.* at 13.)

This defect in the providence inquiry was aggravated by the recent developments in the military's First Amendment jurisprudence. *See United States v. Smith*, ___ M.J. ___, No. 23-0207, 2024 CAAF LEXIS 759, *14 (C.A.A.F. Nov. 26, 2024) (dispensing with the "dangerous speech" test for determining whether speech is protected and deferring to the Supreme Court's jurisprudence on unprotected categories); *United States v. Grijalva*, 84 M.J. 433, 438 (C.A.A.F. 2024) (holding that the Government is required to prove "direct and palpable connection to the military mission or environment not only when it is clear that the First Amendment would protect speech in a civilian context, but also in cases, as here, where a court cannot determine whether the speech would be protected. Appellant's conduct is, at minimum, speech 'implicating the First Amendment'"). Because the regulation did not explicitly outline a narrow military application that might make it constitutionally valid, an accused would require a heightened level of insight not typically present in those without legal training. *United States v. Harman*, 68 M.J. 325, 328 (C.A.A.F. 2010) (recognizing that specialized training may be necessary for an accused to understand their specific duties when faced with an Article 92 offense). The military judge's inquiry did nothing to cure this defect, only referring to the general idea that speech may be uniquely regulated in the military without explaining how. Nor does the guilty plea account for changes in the law that occurred after it was entered, but which should have informed the providence inquiry. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).

B. The providence inquiry did not establish how the subject causes and ideologies were of an extremist or supremacist nature, a defect which could not be cured through the stipulation of fact.

The guilty plea was improvident because the military judge did not elicit sufficient facts to show that the causes that SSgt Sanger allegedly advocated for where in fact supremacist and extremist. A guilty plea must be supported by facts revealed by the accused himself that objectively supports the plea. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F 1996). The inquiry must elicit actual facts from the accused himself, and may not consist merely of legal conclusions. *United States v. Price*, 76 M.J. 136, 139 (C.A.A.F. 2017); *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002). "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 910(e). The guilty plea inquiry contained no discussion of how the causes and ideologies that SSgt Sanger engaged in were supremacist or extremist. Nor did it explain how his activities amounted to "active advocacy." Although the military judge referred to the stipulation of fact, this alone was insufficient without corresponding facts admitted by SSgt Sanger during the inquiry. Put differently, the military judge was required to elicit facts from SSgt Sanger through the providence inquiry, and the stipulation of fact could not be used to independently establish those necessary facts. *See United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (holding that facts could be established through the stipulation of fact if presented in tandem the "inquiry of appellant").

This case contrasts with *United States v. Whitaker*, 72 M.J. 292 (C.A.A.F 2013). The C.A.A.F. recognized the utility of the stipulation of fact in determining the validity of the guilty plea. *Id.* at 293. However, the C.A.A.F. referred to the stipulation of fact as a matter to be considered in conjunction with the providence inquiry, not independently. *Id.* The stipulation of

fact did not obviate the requirement for the military judge to adequately cover the elements of the offense during the inquiry. Here, the military judge did not advise SSgt Sanger on how the causes he advocated were supremacist or extremist. However, this was a crucial matter because the Government specifically chose to charge SSgt Sanger with "actively advocating supremacist and extremist ideology and causes." (Charge Sheet.) Once the Government committed to this charging scheme, the providence inquiry had to establish the elements of that specific offense. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (holding that specific manner of criminal offense alleged must be proven where Government uses particularized and narrowed charging language). This meant that the military judge was required to engage in some discussion of this topic on the record, the stipulation of fact only being available to supplement the inquiry established under R.C.M. 910(e). But the military judge did not advise SSgt Sanger on what qualified as extremist or supremacist ideology or whether the causes he advocated for amounted to those categories. At most, the military judge's discussion of the general concept of the alleged duty in the context of AFI 51-508, and any response provided by SSgt Sanger consisted of mere legal conclusions that did not establish the factual basis necessary. This defect could not be cured with reference to the stipulation of fact alone. *See United States v. Jordan*, 57 M.J. 236, 240 (C.A.A.F. 2002) (recognizing that the stipulation of fact could be used if "cross-referenced in the military judge's inquiry" so as to provide a factual basis for the elements). Accordingly, the failure of the military judge to conduct an appropriate inquiry of this topic renders the plea improvident.

C. Even if SSgt Sanger provided a sufficient basis to show he was guilty-in-fact, he could not be found guilty-in-law because AFI 51-508 was an unlawful and unconstitutional basis for imposing any duty.

This Court should find that SSgt Sanger's guilty plea for actively advocating supremacist and extremist ideologies was improvident because the offense he was charged with infringed on his First Amendment rights. This is because the duty that the Government alleged SSgt Sanger violated – as described in SSgt Sanger's opening brief – could not survive constitutional scrutiny. AFI 51-508 ¶ 3.4, was facially unconstitutional, overbroad, and void-for-vagueness. (Opening Br. at 4.) No set of facts could have been elicited from SSgt Sanger during the guilty plea inquiry to overcome these fatal deficiencies. At most, SSgt Sanger could admit to factual guilt for violating AFI 51-508 ¶ 3.4. (R. at 26.) But factual guilt alone is insufficient where "the charge is one which the [Government] may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975).

SSgt Sanger could not be found guilty of willful dereliction of duty unless he was charged with a valid – constitutionally permissible – duty. "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service." *M.C.M.* (2019) at Part IV, ¶ 18.c.(3).(a). However, once a duty is committed to regulation, that version takes precedence over other sources of military duty such as custom, which forecloses bases for prosecution outside of the regulation. *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985). No duty may be imposed by regulation where it offends the Constitution or is not "reasonably necessary to safeguard and protect the morale, discipline and usefulness of members of command and directly connected with maintenance of good order in services." *United States v. Nation*, 9 C.M.A. 724, 726 (1958). A regulation curtailing a servicemember's speech must have a "valid military purpose and issue a clear, specific, and narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003).

As shown in the stipulation of fact, the Government used AFI 51-508 as the basis for restricting SSgt Sanger's speech. (Pros. Ex. 1.) The military judge relied on this regulation while conducting the providence inquiry by using it as the source of the duty. (R. at 25-26.) However, for the multitude of reasons discussed in SSgt Sanger's opening brief, AFI 51-508 ¶ 3.4's blanket prohibition on SSgt Sanger's protected speech was unlawful. (Opening Br. at 4.) Moreover, the regulation was unlawful because it did not express a valid military purpose that was "clear, specific, and narrowly drawn." *Moore*, 58 M.J. at 468. This is because the regulation was not limited to conduct which might have a specific impact on the military mission or environment. Rather, it prohibited all activities including those taking place entirely outside of a military context. This places AFI 51-508 ¶ 3.4 in direct conflict with the First Amendment. *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008) (explaining that prohibitions against First Amendment activities are permissible only when narrowly focused on activities prejudicial to good order and discipline). AFI 51-508 ¶ 3.4's broad scope therefore invalidated it as a source of lawful duty that could be used to prosecute SSgt Sanger.

The regulation's broad application is analogous to the one the C.A.A.F. struck down in *United States v. Pugh*, 77 M.J. 1 (C.A.A.F. 2017). That case dealt with an Air Force regulation that imposed a blanket prohibition on all products made from hemp seed and hemp seed oil. *Id.* at 8. The C.A.A.F. disagreed with the Government that the regulation advanced a valid Government purpose in protecting "the reliability and integrity of the drug testing program." *Id.* (internal quotations removed). This is because "a blanket ban on all legally available commercial food products sold and regulated in the United States [did] not advance [that] military purpose." *Id.* at 9. Similarly, AFI 51-508 ¶ 3.4's blanket ban on all protected First Amendment activities related to extremist and supremacist viewpoints – including those with no nexus to the military mission or

environment – is "an insufficient basis to support a charge of dereliction." *Id.* The military judge should have rejected the regulation as a legitimate source of duty. Even if some other source of duty could have existed, and such a duty did not incur the same constitutional issues, none was elicited during the providence inquiry. This created a substantial issue of law that renders the plea improvident.

D. The guilty plea was improvident for willful dereliction of duty because SSgt Sanger could not have willfully violated an alleged duty imposed by a vague regulation.

The providence inquiry failed to establish that SSgt Sanger had violated the third element of the offense by being *willfully* derelict in failing to refrain from actively advocating supremacist and extremist ideologies and causes. "'Willfully' means intentionally . . . [I]t refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act." *M.C.M.* (2019), Part IV, ¶ 18.c.(3)(c); *see United States v. Bernacki*, 16 C.M.A. 641, 644 (C.M.A. 1963) (emphasizing the term "willfully" to mean specifically intending the result produced). *Willful* dereliction of duty is a distinct crime from *negligent* dereliction of duty. *United States v. Blanks*, 77 M.J. 239, 241 (C.A.A.F. 2018); *United States v. DeSilva*, No. ACM S32335, 2016 CCA LEXIS 588, at *6 (A.F. Ct. Crim. App. Oct. 4, 2016). The lower standard for negligence requires only that there be "an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *M.C.M.* (2019), Part IV, ¶ 18.c.(3)(c).

Where the Government charges *willful* dereliction of duty, the providence inquiry must establish the alleged conduct was in fact willful as opposed to merely negligent. *DeSilva*, 2016 CCA LEXIS 588, at *6. The guilty plea inquiry did not establish that SSgt Sanger was willfully derelict because it did not show that he knowingly and purposely engaged in active advocacy that could be subject to criminal prosecution in the military. This is because active advocacy as outlined

in AFI 51-508 ¶ 3.4 could only be sanctioned if it "had a reasonably direct and palpable effect on the military mission or military environment." *Wilcox*, 66 M.J. at 451; *Grijalva*, 84 M.J. at 438. That SSgt Sanger could have knowingly and purposely intended to produce a violation AFI 51-508 ¶ 3.4 that was constitutionally narrowed is strained by the regulation's lack of clarity. A finding of willful dereliction of duty is hindered where the duty requires heightened skill, ability, or assistance to ascertain. *United States v. Powell*, 32 M.J. 117, 121 (C.M.A. 1991). Such is the case here where the regulation did not readily supply a constitutionally permissible limitation based on military impact. This means that an accused would require heightened legal insight to sufficiently understand the duty to be willful in violating it. SSgt Sanger denied having this level of insight, explaining "I understood I was doing something wrong, but I didn't know, *specifically*, what it pertained to." (R. at 24) (emphasis added).

Conversely, willful dereliction may be shown where the duty is clearly articulated and known. This case contrasts with *Harman*, 68 M.J. 325. In that case, the appellant challenged her conviction for willful dereliction of duty for failing to protect Iraqi detainees from abuse, cruelty, and maltreatment. *Id.* at 327. She argued that she could not been willfully derelict because she was not properly trained on the protocols for detainee treatment. *Id.* The C.A.A.F. rejected this, holding that "Appellant's participation [went] beyond mere acquiescence or negligent dereliction of duty: she actively and willingly participated in [the abuse]." *Id.* at 328. The C.A.A.F. noted that the appellant had received training on the "care, custody and control of detainees as well as in the basic requirements of the Geneva Conventions regarding their treatment." *Id.* For this reason, she "did not require specialized training to know that her actions were wrong." *Id.; see United States v. Pacheco*, 56 M.J. 1, 3 (C.A.A.F. 2001) (affirming conviction for willful dereliction of duty where evidence established that appellant "was informed that the taking of weapons as

trophies was not permitted") *cf. United States v. Taylor*, 61 M.J. 640, 643 (C.G. Ct. Crim. App. 2005) (rejecting guilty plea for willful dereliction where "Appellant's command provided incomplete and misleading training" on duty). In this case, the providence inquiry did not establish that SSgt Sanger had the requisite training or background to understand a constitutionally nuanced duty to refrain from active advocacy such that he could have willfully violated it. Moreover, it did not show that SSgt Sanger specifically intended to engage in active advocacy that resulted in an impact to the military mission or environment.

At the very least, to establish whether SSgt Sanger could have been willfully derelict for conduct involving constitutionally protected conduct, the military judge was required to engage in a heightened plea inquiry. Where a charge implicates constitutionally protected conduct, the military judge must employ a heightened plea inquiry that includes "an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) (quoting *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011)). This must include a discussion concerning the existence of constitutional rights relevant to situation to ensure that the accused understands why his behavior under the circumstances did not merit such protection. *United States v. Byunggu Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023). The plea inquiry did not discuss the crucial distinction between protected speech and speech which may be subject to regulation by virtue of the unique nature of the military. The military judge did not inquire as to how the activities that SSgt Sanger admitted to could be prohibited by having a "direct and palpable connection to the military mission or environment." *Grijalva*, 84 M.J. at 438. Nor did he explore how SSgt Sanger may have specifically intended that result so as to show willfulness. Accordingly, this Court should find that

a substantial basis in law and fact exists for questioning the guilty plea and set aside the findings and sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial & Appellate Operations Division on 23 June 2025.

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